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1896.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

Probate Division.

COURTS OF PROBATE, DIVORCE, AND ADMIRALTY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL;

ALSO DECISIONS IN THE

ECCLESIASTICAL COURTS.

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JUDGES

OF

THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE.

1896.

The Right Hon. Sir **Francis Henry Jeune**, Knt.,
President.

The Hon. Sir **John Gorell Barnes**, Knt.

JUDGES

OF

THE COURT OF APPEAL.

1896

Lord Halsbury, Lord Chancellor.

Lord Russell of Killowen, Lord Chief Justice of England.

Lord Esher, Master of the Rolls.

Sir Francis Henry Jeune, President of the Probate, Divorce and Admiralty Division.

Sir Nathaniel Lindley, Sir Henry Charles Lopes, Sir Edward E. Kay, Sir Archibald Levin Smith Sir John Rigby,	Ordinary Judges of Court of Appeal.

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CASES

DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

1895. 1896.

FORD (FALSELY CALLED STIER) *v.* STIER.

1895
Oct. 25, 26.

Nullity of Marriage—Duress.

On the trial of a petition for a declaration of nullity of marriage, on the ground of duress, the following facts appeared. The petitioner, a girl of seventeen, went through the ceremony of marriage with the respondent in a church on June 5, 1889. He was a friend of her brother's. She had met him only a few times, and he had never spoken to her of marriage, or professed affection for her. She stated that on the day in question her mother told her that they were going for a drive, and that they drove to the church, where they found the respondent; that she thought she was being betrothed to him, and would not have submitted even to that if she had not been so much under her mother's influence, that she did what she was told; that, on leaving the church, she threw away the ring; that she had never seen the respondent since; and that none of her family then knew what had happened except her mother, who died in 1890. A few days before, the respondent had obtained a marriage licence, falsely stating in his affidavit that the petitioner's father consented to the marriage. On June 5 he sailed for South Africa with the petitioner's brother, and on their arrival told him of the marriage. Her brother returned in 1889, but did not mention the matter to any member of his family except his mother, who told him to say nothing about it. In 1893 the petitioner went through the ceremony of marriage with another man. In the same year the respondent wrote to her father from South Africa, claiming her as his wife.

The Court, upon consideration of the evidence, found that the petitioner had never consented to marry the respondent, but had gone through the ceremony as one of betrothal, and in doing so had been to such an extent under the influence of her mother and the respondent that she was not a free agent, and granted a decree nisi of nullity.

PETITION of Ella Louise Ford for a declaration of the nullity of the marriage solemnized between her and the respondent William Douglas Somerset Keppel Stier. The case was tried by Gorell Barnes J. without a jury. The respondent did not appear.

The evidence was as follows:—

Ella Louise Ford, the petitioner.

The respondent was a friend of my brother, Arthur William Clark. In June, 1889, I was seventeen. I was never engaged to Mr. Stier. He had paid me no attention. I hardly knew him. I first heard of my marriage to him in 1893, when my father told me of a letter which he had received from Mr. Stier claiming me as his wife.

The Judge: The letter says, "She has expressed a desire to join me."

The witness: That is not true. I never set eyes on Mr. Stier since June 5, 1889, and I have never corresponded with him. I did not know where he was. On June 5, 1889, my mother told me we were going out for a drive. She did not say anything about marriage. I dressed. We drove to a church. I saw Mr. Stier. I did not know he was going to be there. My mother said it was to be a betrothal, not a marriage. I said that I did not want to be engaged to Mr. Stier, for I did not know him. I did as my mother told me. She said, "It will be all right, if you do as I wish." I don't remember much about it. I was dazed. I have a faint idea of having gone before a clergyman. There was a ring. I took it off and threw it away. We went home. My mother told me to say nothing. I remember signing my name.

The Judge: For what purpose did you think you were signing your name?

The witness: I had been told it was a betrothal.

The Judge: Had you ever read the marriage service?

The witness: I had not.

The Judge: Had you ever seen a wedding?

The witness: No.

The Judge: Why did you consent to be betrothed?

The witness: I said before Mr. Stier that I did not wish to be betrothed to him. My mother never referred to the matter again. She died in 1890. I married Mr. Ford in 1893.

Alfred Aurelius Clark, the father of the petitioner.

The petitioner was very much under the influence of my wife, who was a strong-minded woman. I have seen Stier at our house. I never heard of the marriage till I received a letter from him in 1893. I wrote a most indignant reply. I have never heard from him since. In 1889 I was supposed to be wealthy.

An affidavit by the respondent dated June 4, 1889, was produced from the Bishop of London's Registry. It stated that the petitioner was eighteen years of age, and that her father, who was described as Arthur Walter Clark, consented to the marriage.

Arthur William Clark, the brother of the petitioner.

The respondent was a friend of mine. I introduced him to my sister. He was then about thirty. Stier and I had arranged to go to South Africa together. We started to catch the *Tartar* at Lisbon on June 1, 1889, but missed her and came back from Paris to London. We sailed together in the *Hawarden Castle* on June 5. Stier first told me at Capetown that he had married my sister. He said he had married her at a church, and that my mother had been present, but my father did not know. He said he would be in Africa for two years, he knew Cecil Rhodes, and would work hard and come back. I quarrelled with him, but went to Durban in the same steamer. I heard from him in 1890. He asked how my sister was. I thought they seemed to like each other. Stier used to go to the theatre with us, but he paid her no particular attention. I returned to England in 1889. I spoke to my mother, but not to my father or my sister. My mother said, "Say nothing about it. It is all right."

The entry of the marriage in the register of St. Mary Abbot's Church, Kensington, was produced. The petitioner's father's name and her address were wrongly stated in it.

One of the witnesses who had signed the register was called, but did not recollect the marriage.

The Judge: The signature of the petitioner is firmly written.

Alfred Beyfus, solicitor, stated that the petitioner had given a similar account of the marriage to him in 1893, when he was consulted as to the letter of the respondent to her father.

The petitioner, recalled, said in answer to the judge:—

I recollect my brother returning from South Africa. Nothing took place between him and me as to the marriage. Inside the church, before we moved up to the chancel, I said before my mother and Mr. Stier that I did not want to be betrothed to him; that I did not know him sufficiently.

The Judge: Why did you not refuse to go through the ceremony?

The witness: I said I did not want to go through it.

The Judge: Why did you not refuse and walk away?

The witness: I thought it would be all right.

The Judge: What did you think it meant? Did you not think it bound you?

The witness: I thought we only became engaged. I had known Mr. Stier for about three weeks. I recollect his once going to the theatre with us. No words of affection ever passed between Mr. Stier and me.

Bargrave Deane, for the petitioner, referred to *Scott* (*falsely called Sebright*) v. *Sebright* (1); *Cooper* (*falsely called Crane*) v. *Crane* (2); *Bartlett* (*falsely called Rice*) v. *Rice*. (3)

(1) 12 P. D. 21.

(2) [1891] P. 369.

(3) 72 L. T. (N.S.) 122.

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FORD
v.
STIER.

GORELL BARNES J. This case is a very remarkable one. The petitioner claims a declaration of the nullity of the marriage solemnized between her and the respondent at St. Mary Abbot's Church, Kensington, on June 5, 1889, on the ground that, owing to the duress to which she was subjected by her mother and the respondent, she was not a free agent in going through the ceremony.

It appears that the respondent had never spoken of marriage to the petitioner, or professed affection for her. She had met him only a few times. She was a girl of seventeen, inexperienced, of a nervous temperament, and much under the influence of her mother, a woman of strong character. The respondent and the petitioner's brother started for South Africa on June 1. They missed the steamer and returned to London. On June 4 the respondent obtained a marriage licence, stating in his affidavit that the petitioner's father had given his consent. The petitioner's father had never heard of the matter, and the respondent misstated his name in the affidavit.

According to the petitioner's statement, on June 5 her mother told her that they were going out for a drive. They drove to St. Mary Abbot's, and there she was induced to go through the ceremony which has led to this suit. She says that she thought it was a betrothal, and objected to going through even that ceremony with the respondent, as she did not know him, but was so much under her mother's influence that she did as she was told. She declares that she said in the respondent's presence that she did not wish to be betrothed to him, and that he said, "Do as your mother tells you." The clergyman who officiated has not been called, but her manner does not seem to have attracted attention. She says that after the service she threw away the ring, and went home, that she has never seen the respondent since, and that the only member of the family who then knew what had happened was her mother. Her mother is now dead.

The petitioner's brother left for South Africa with the respondent on the day of the marriage. He states that on his arrival the respondent told him of the marriage, that he quarrelled

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with the respondent in consequence; and that on his return he mentioned the matter to no one but his mother, who told him to say nothing about it. The petitioner's father never heard of the marriage till he received the respondent's letter in 1893. He then sent for his daughter, who had in the meantime married Mr. Ford. The solicitor's evidence shews that the statement which she then made was substantially the same as that which she has made in Court.

I have seen the petitioner in the witness-box and am satisfied that she has given her evidence in good faith. Her case is, "I never intended to marry this man; I thought I was being betrothed to him"—certainly it is remarkable that a person of any education should have thought such a thing, but I can only judge by her manner—"and I submitted to be betrothed only because my mother and he forced me to do so." I find that this was so, that she did not consent to marry the respondent, but went through the ceremony as one of betrothal, and in so doing was to such an extent under the influence of her mother and the respondent that she was not a free agent. I therefore pronounce a decree nisi of nullity, with costs against the respondent.

Solicitors: *Beyfus & Beyfus*.

H. D. W.

1895
Nov. 11.

IN THE GOODS OF HENRY AND HANNAH TEECE.

Administration—Grant to Creditor—Notice to Next of Kin in lieu of Citation—Court of Probate Act, 1857 (20 *&* 21 *Vict. c.* 77), *s.* 73.

In granting administration of a small estate to a creditor, the Court dispensed with the citation of the next of kin, on proof that they had received notice of the application.

HENRY TEECE died intestate in 1893, leaving him surviving his widow, father, since deceased, and brothers and sisters. The estate was of the value of about 50*l.*, and passed, by virtue of s. 1 of the Intestates' Estates Act, 1890 (53 & 54 Vict. c. 29) (1), to his widow. He died indebted to the Wakefield Union in 5*l.* 10*s.* for her maintenance as a pauper lunatic.

Hannah Teece, widow of Henry Teece, died in 1894 without child or parent, but leaving her surviving a brother and sister. The estate was less than 50*l.* in value; and 25*l.* 6*s.* was due to the Wakefield Union for her maintenance since the death of her husband.

On an application by the clerk to the guardians of the Wakefield Union for grants of administration of the two estates, it appeared that the next of kin of the deceased persons had not been cited, but had received notice of the application.

Bargrave Deane, for the applicant.

GORELL BARNES J. held that citation might be dispensed with, and granted administration under s. 73 of the Court of Probate Act, 1857.

Solicitors: *Clarke & Blundell, for Harrison, Beaumont & Smith, Wakefield.*

(1) By the Intestates' Estates Act, 1890 (53 & 54 Vict. c. 29), s. 1, "The real and personal estates of every man who shall die intestate after September 1, 1890, leaving a widow but no issue, shall, in all cases where the net value of such real and personal estates shall not exceed five hundred pounds, belong to his widow absolutely and exclusively."

H. D. W.

IN THE GOODS OF OAKEY.

1895
Nov. 4.

Administration—Estate partly administered—Amount of Bond.

Where, after an estate had been partly administered, application was made for a grant of administration, the Court allowed a bond to be given in double the amount of the unadministered estate.

SOPHIA OAKEY died intestate in 1891 a widow, leaving six children her next of kin. The value of the estate had originally been 33,041*l.*; that of the part left unadministered was 12,228*l.*

Herbert Oakey, the guardian of two of the children who were minors, applied for a grant of administration for their use and benefit till one of them should attain the age of twenty-one, upon giving a bond with two sureties in double the value of the unadministered estate.

Priestley, for the applicant.

GORELL BARNES J. granted the application. (1)

Solicitor: *Daniel Stock.*

(1) See *In the Goods of Amelia Fozard* (3 Sw. & Tr. 173), and *In the Goods of Halliwell* (10 P. D. 198).

H. D. W.

1895
Nov. 4.

IN THE GOODS OF ROBERTSON.

Presumption of Death—Practice—Necessity for Advertisements.

On an application for leave to swear an affidavit of the death of a person who had disappeared, the Court, though the estate was small, and the person had not been heard of for twenty-five years, ordered that advertisements requesting information concerning him should be published in newspapers.

APPLICATION for leave to swear that William Graham Robertson had died in or since the year 1870.

The applicant, the brother and one of the next of kin of William Graham Robertson, stated on affidavit that that person had in 1863 emigrated to Australia, and had up to 1870 corresponded with his family, but that since 1870 they had received no letters from him. The value of the estate was about 160*l*.

Bargrave Deane, for the applicant, submitted that, considering the smallness of the estate and the length of time for which the person had not been heard of, advertisements might be dispensed with.

GORELL BARNES J. ordered that advertisements, requesting information as to the person whose death was to be presumed, should be published in newspapers.

Solicitors: *Howe & Rake, for Toulmin, Ward & Carruthers, Liverpool.*

H. D. W.

IN THE GOODS OF RILEY.

1895
Nov. 25.

Probate—Practice—Necessity for lodging Documents in Registry.

The Court refused to hear a motion for the revocation of a grant of probate, and a declaration of the validity of a draft will, where the probate and draft had not been lodged in the registry.

MOTION for the revocation of the probate of a will made by Maria Eleanor Riley in 1888, and a declaration of the validity of a will made by her in 1889, a draft of which was exhibited. It appeared that the probate and draft had not been lodged in the registry.

Le Bas, for the applicants.

GORELL BARNES J. The practice of the Court requires that the probate and draft should be lodged in the registry. As this has not been done, the motion cannot be heard. It is adjourned for a week.

Solicitor: *A. Toovey.*

H. D. W.

1895
Nov. 5.

[DIVISIONAL COURT.]

THE GLENOCHIL.

Admiralty—Damage to Cargo—Bill of Lading incorporating the Harter Act (Act of Congress, Feb. 13, 1893)*—Negligence in "Management" of the Vessel in Port of Discharge.*

Goods were shipped under a bill of lading incorporating the Act of Congress known as "the Harter Act," by which the owner of the vessel is not to be "held responsible for damage or loss resulting from faults or errors in navigation or in the management of" the vessel.

After the arrival of the vessel at her port of destination, and during the discharge of the cargo, it became necessary to stiffen the ship. For this purpose the engineer ran water into a ballast tank, but negligently omitted first to ascertain the condition of the sounding-pipe and casing, which had, owing to heavy weather during the voyage, become broken. The owner of the goods damaged by the water getting to the cargo, sought to render the shipowner liable:—

Held, by the Divisional Court (Sir F. H. Jeune, President, and Gorell Barnes J.), affirming the decision of a county court judge, that the shipowner was exempt from liability, as the damage resulted from a fault in the "management" of the vessel, and the operation of the exception as to "management" was not limited to the period during which the vessel was at sea, but extended to the period during which the cargo was being discharged.

Appeal by the defendants, indorsees and holders of a bill of lading of 1640 bags of cotton-seed oil-cake, carried in the steamship *Glenochil*, against a decision of the judge of the county court of Lancashire, holden at Liverpool, in favour of the plaintiffs, the owners of the steamship, in an action to recover 129*l*. 10*s*. 8*d*. balance of freight.

The defendants admitted the plaintiffs' claim, but counterclaimed for 121*l*. 18*s*. 1*d*., for damage caused to the oil-cake while in the plaintiffs' ship, and paid into court 7*l*. 12*s*. 7*d*., being the difference between the two amounts.

The bill of lading contained the usual exception as to perils of the seas, and further provided that the shipowner was to be subject to all the terms and provisions of, and all the exemptions from liability contained in, the Act of Congress of the

United States approved on February 13, 1893, and commonly known as "the Harter Act."

By s. 3 of that Act, "neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of the said vessel." (1)

The *Glenochil* was a steamship of 1581 tons register, fitted with four holds and a cross-bunker, with four water-ballast tanks fore and aft, one being under each hold, and the engine-room. These tanks were filled by means of a valve at the bottom of the ship, and were fitted with air-pipes and sounding-pipes about two inches in diameter, which led from the top of the tanks against the bulkhead to the main deck. The pipes were cased in wooden casings, and on January 8, when the *Glenochil* sailed from New Orleans for London, were in good condition. During the course of the voyage the vessel met with exceptionally heavy weather, owing to which, amongst other damage, the bilge sounding-pipes shifted, and on the arrival of the vessel in London it was found that three or four pipes of the bilge-pumps were broken in Nos. 3 and 4 holds, and also the sounding-pipes to the bilges in No. 2 hold. The *Glenochil* arrived in the Millwall Dock on February 14, and commenced discharging. Part of the cargo having been discharged, on February 18 the vessel commenced taking in outward cargo in No. 4 hold. As the discharge went on, and before the whole of the defendants' cotton-seed oil-cake had been delivered out of No. 2 hold, it became necessary to fill some of the water-ballast tanks in order to stiffen the ship. To do this the engineer turned on the cock for water to run into the tank under No. 2 hold, the effect of which was to drive water up the sounding-pipe with considerable force; and on February 23 the bottom tier of the defendants' bags of oil-cake in No. 2 hold were found to be damaged by water to the amount of the counter-claim. On February 25, after the cargo was discharged, it was discovered that the water-ballast sounding-pipe and casing were cracked across, and broken about

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(1) The Act is set out at pp. 409 and 410 of *Dobell* v. *Steamship Rossmore Co.* ([1895] 2 Q. B. 408).

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4 inches above the tank-top on the port side, and were from $\frac{3}{4}$-inch to 1 inch out of the perpendicular. The break was about 2 or 3 inches above the floor of No. 2 hold, and was caused by the straining of the vessel during the heavy weather on the voyage.

The learned county court judge found that it was negligence on the part of the ship not to have ascertained the existence of the break above the floor of No. 2 hold by using the sounding-rod prior to admitting water into No. 2 tank; but he gave judgment for the plaintiffs for the amount claimed, beyond the amount paid into court, on the ground that the exceptions in s. 3 of the Harter Act covered the damage to the cargo, though caused by the negligence of the ship, for the "damage resulted from an act done by one of the officers of the ship in the management of the vessel in order to give her stability for the purpose of discharging her cargo carried under a contract contained in the bill of lading. Sect. 3 of the Harter Act does not confine the exception as to 'management' of the vessel to the period while the ship is being navigated, and therefore extends the operation of the exception in the bill of lading to the period while the cargo is on board and still undelivered."

Joseph Walton, Q.C., and *Horridge*, for the appellants (defendants). Under s. 1 of the Harter Act the shipowner is liable for negligence in the care of the goods. He cannot escape that liability by taking shelter under s. 3, as the latter section does not apply to the facts of this case as found by the learned judge in the Court below, for the negligence occurred when the vessel was in port after the voyage was over, and when faults or errors in the "navigation or management" of the vessel could no longer arise.

In the case of *The Accomac* (1), where water got into the vessel through negligence in the removal of a bilge-pump whilst the vessel was discharging her cargo, it was held that the shipowner was liable for the damage because, though the charterparty excepted negligence in the "navigation of the ship

(1) 15 P. D. 208.

in the ordinary course of the voyage," the ship was no longer being navigated.

In *The Southgate* (1) Gorell Barnes J. declined to express a positive opinion whether the words "accidents of navigation" would cover an incursion of water into a ship while she lay at her moorings.

The word "management" only gives a wider meaning to the word "navigation"; it does not extend its meaning so as to include a time and place to which the word "navigation" would not apply. The provisions of the Harter Act were considered in *Dobell* v. *Steamship Rossmore Co.* (2), and, though the question there raised was as to the seaworthiness of the vessel before starting on her voyage, there is a dictum of Kay L.J. that the exception as to "faults in navigation or in the management of the vessel" applies to "faults in sailing the vessel, or in managing the sailing of the vessel," and, therefore, has no application to the period during which the vessel is discharging in port. In *The Ferro* (3) the President illustrated the meaning of the word "management" by the case of the removal of the hatches for the sake of ventilation; and Gorell Barnes J. said that he was not satisfied that the words "management of the ship" went much, if at all, beyond the word "navigation."

Pickford, Q.C., and *Maurice Hill*, for the respondents (plaintiffs). The filling of the water-ballast tank for the purpose of stiffening the ship was an act done in the "management" of the ship within the meaning of the Harter Act, for, though the necessity for stiffening arose from the fact that part of the cargo had been discharged, it was not a matter affecting the cargo. There is nothing in the Act to shew that s. 3 is limited to the period during which the vessel is at sea; and the expression used in *Dobell* v. *Steamship Rossmore Co.* (2) is only a dictum not necessary for the decision of the case. The same may be said of the references to the meaning of the word "management" in *The Ferro* (3), and the meaning of the word "navigation" in *The Southgate*. (1) In *The Carron Park* (4) it was held that the "voyage" included the period of time during which the

(1) [1893] P. 329.
(2) [1895] 2 Q. B. 408, at p. 415.
(3) [1893] P. 38.
(4) 15 P. D. 203.

vessel was being loaded, and by analogy it would include the period during which the vessel was being discharged. In *Laurie* v. *Douglas* (1) the exception in the bill of lading of "all and every the dangers of the seas and navigation" protected the shipowner from damage to the cargo during the discharge. In *Carmichael* v. *Liverpool Sailing Ship, &c., Association* (2), Lord Esher M.R. observed that there might be "navigation" without any voyage at all.

Horridge, in reply. In *The Carron Park* (3) the words in the charterparty were quite different to those in the Harter Act relied upon here as incorporated in the bill of lading. In *The Accomac* (4) the case of *Laurie* v. *Douglas* (1) was pressed upon the attention of the Court; but Lord Esher M.R. said (5): "It is impossible to say whether I can agree with that decision at all without knowing the reasons on which it was based."

SIR F. H. JEUNE, PRESIDENT. The question is whether the Harter Act applies to the present case so as to give rise to an exemption from what the learned judge found to be negligence. On the question of fact we must take his judgment, for we have no evidence before us as to what that negligence was. It is sufficient for us to say that it is negligence consisting in a mismanagement of part of the appliances of the ship, and mismanagement which arose because it was intended to do something for the benefit of the ship, namely, to stiffen her, the necessity for stiffening arising because part of her cargo had been taken out of her. In that operation of stiffening there was a mismanagement of a pipe, and the result was that water was let in and damaged the cargo—water which was intended to act merely as ballast.

It is not, at first sight, easy to understand the meaning of the Harter Act, and to reconcile s. 1 and s. 3; but I think the correct explanation has been given to us by the learned counsel who appear for the respondents. No doubt the object of s. 1 is in terms to prevent clauses being inserted in mercantile instruments which

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(1) 15 M. & W. 746.
(2) 19 Q. B. D. 242.
(3) 15 P. D. 203.
(4) 15 P. D. 208.
(5) 15 P. D. 208, at p. 211.

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would exempt the carrier from want of proper care in regard to the cargo. It is obvious that those words cannot be taken in their largest sense, because in a secondary, though not primary, sense, any mismanagement of the ship, in navigation or otherwise, is want of proper care as regards the cargo. But it is clear that it was intended by s. 3 to exempt from liability for damage or loss resulting from faults and errors of navigation or in the management of the vessel; and the way in which those two provisions may be reconciled is, I think, first that the Act prevents exemptions in the case of direct want of care in respect of the cargo, and secondly, the exemption permitted is in respect of a fault primarily connected with the navigation or the management of the vessel and not with the cargo. Now, is this a fault in the management of the vessel within the meaning of the bill of lading? It is not necessary to deal with it as a question of navigation. It is sufficient to deal with it as a question of management. It is said, however, that the two things are one and the same, and that management and navigation mean the same thing, because the management is only in the navigation; and no doubt upon that a formidable argument arises, for it is put upon a dictum, though only a dictum, of Kay L.J. It is said that that learned judge expressed the view (1) that, "contrasting the various clauses of the bill of lading, the expression 'faults or errors of navigation or in the management of the vessel' applies rather to faults or errors in sailing the vessel, or in managing the sailing of the vessel, than to a matter of this kind." But when one considers what the matter then in question was, namely, that it was something antecedent to the commencement of the voyage, although part of the cargo had been put in, and that it was a fault connected with the construction of the ship, or, at any rate, the seaworthy condition of the ship, one sees, I think, that what the Lord Justice really had in his mind was not a contrast between the management of the vessel while sailing and while lying in harbour, but rather a contrast between the state of the ship, as a matter of seaworthiness, and mismanagement of the ship during the voyage. That, I think, is not an unreasonable view to put upon the Lord Justice's words; and it

(1) *Dobell* v. *Steamship Rossmore Co.* ([1895] 2 Q. B. 408, at p. 415).

seems to me clear that the word "management" goes somewhat beyond—perhaps not much beyond—navigation, but far enough to take in this very class of acts which do not affect the sailing or movement of the vessel, but do affect the vessel herself. This Court had before it the same sort of question in the case of *The Ferro* (1), and I adhere to what I said then, that mere stowage is an altogether different matter from the management of the vessel. It may be that the illustration I gave in that case, as to the removal of the hatches for the sake of ventilation, was not a very happy one; but the distinction I intended to draw then, and intend to draw now, is one between want of care of cargo and want of care of vessel indirectly affecting the cargo.

The other argument which was pressed upon us was that the terms "management" and "navigation" under the provisions of the Harter Act apply only to the period of navigation itself, and that is said to end when the vessel comes into dock. For that the authority of *The Accomac* (2) is relied on. It is quite true that in that case, where the words were "navigation in the ordinary course of the voyage," it was held that the navigation ceased when the vessel got into dock. But I do not see that there is anything in that case to limit the period during which the words now in question are to apply. I do not say whether navigation in the strict sense of the term is limited to the period during which the vessel is sailing—that is to say, in motion; but I see no reason for limiting the word "management" to the period of the vessel being actually at sea. I think it is not necessary to refer to any of the cases which limit the meaning to be attached to the decision in *The Accomac.* (2) I do not think it is necessary to refer to the case of *The Carron Park* (3), where the voyage was held by Lord Hannen not to consist merely of the time during which the vessel was proceeding, nor to the dictum of my learned brother in the case of *The Southgate* (4), because, taking the words of *The Accomac* (2) as they stand, they do not go far enough to place the limitation suggested on the period of management. It appears to me,

(1) [1893] P. 38.
(2) 15 P. D. 208.
(3) 15 P. D. 203.
(4) [1893] P. 329, at p. 337.

therefore, that the judgment of the learned judge was correct. I think that here there was a failure in the management of the vessel; but from the effects of that failure of management of the vessel the shipowners are exempted by the words of the bill of lading incorporating the Harter Act.

Gorell Barnes J. The question in this case is whether or not the shipowners are liable for the damage to the cargo. That question turns upon the construction of the bill of lading under which the goods were carried, and which not only provided that the dangers of the seas should be excepted, but also that the shipment was made subject to all the terms and provisions of, and all exemptions from liability contained in, the Act of Congress of the United States, approved on February 13, 1893, which is known as the Harter Act.

In the 3rd section of that Act there is found a provision that "neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of the said vessel." There are other exemptions, but that is the one upon which the question arises in this case. Now, it appears that on the arrival of the vessel at the port of discharge, and in order to complete the discharge, it became necessary to stiffen the ship by filling one of the water-ballast tanks. The ballast tank was accordingly filled up; but, owing to an injury sustained in the course of the voyage, the ballast tank, when filled, admitted, from a broken sounding-pipe, water into the cargo space; and the learned county court judge found that, in the circumstances of the case, there was negligence in not having sounded and ascertained that that breakage existed before filling up the water-ballast tank. He states in his judgment that he thinks this was damage which resulted from an act done by one of the officers of the ship in the management of the vessel, in order to give her stability for the purpose of discharging her cargo, carried under the bill of lading. And then he states what seems to me to be the right conclusion of law to come to in this case, namely, that "Sect. 3 of the Harter Act does not confine the exception as to the 'management' of the vessel to the period while the ship is being navigated, and therefore in my opinion extends the operation of the exception in the bill of lading to the period while the cargo is on board and still undelivered."

The contest before us has been as to whether or not the word "management" in the section referred to, which by incorporation of the section into the bill of lading is to be read as part of the contract made by the bill of lading—whether the word "management" in that section covers the loss in question in this case. Counsel for the plaintiffs have put the case not so much upon the word "navigation," because of the expressions in the judgment of the Court of Appeal in the case of *The Accomac*. (1) I do not think it necessary to say anything about that case, further than this, that the words in that case are not the same, and that the expression "management of the ship" does not occur in it. The argument having been upon the word "management," it is said that in the case of *The Ferro* (2) there are expressions which shew that the word "management" has no further signification than the word "navigation." That is certainly not the decision in the case of *The Ferro*. (2) That was a case in which it was sought to exonerate the shipowner from improper stowage by the stevedore under the words "navigation or management of the ship"; and we held in this Court that negligent stowage by the stevedore was not within those words, and I see in the judgment which I delivered I stated (3) that some things might be suggested to which the word "management" was applicable beyond those of navigation.

Here we have a case in which there is an act of mismanagement which it might, perhaps, be said is not strictly navigation. I do not think it is now necessary to decide whether it is or is not; but it certainly seems to me to be a fault in the management of the vessel in doing something necessary for the safety of the ship herself. In the course of the argument two principal points seem to me to have been taken. It is said that the word "management," having regard to the other sections of the Act, cannot mean management of the vessel which may affect the cargo by letting water into the ship. But I think if those

(1) 15 P. D. 208.
(2) [1893] P. 38.
(3) [1893] P. 38, at p. 46.

sections are looked at there will be found a strong and marked contrast in the provisions which deal with the care of the cargo and those which deal with the management of the ship herself; and I think that where the act done in the management of the ship is one which is necessarily done in the proper handling of the vessel, though in the particular case the handling is not properly done, but is done for the safety of the ship herself, and is not primarily done at all in connection with the cargo, that must be a matter which falls within the words "management of the said vessel."

Then it is said that "management" could not extend to the time after the ship had arrived in the port of discharge, because it is said that the word "navigation" in the case of *The Accomac* (1) did not have a similar extension. In that case, however, the words were different, as they were "navigation of the ship in the ordinary course of the voyage." It seems to me that all exemptions extend from the time the cargo was taken on board to the discharge, though the terms of the exemptions themselves may not necessarily cover the particular act. For instance, if the navigation is said to cease at the time of arrival, the word does limit the time; but there is nothing here to limit the time during which the word "management" extends; and it seems to me that it must extend, as the county court judge has said, up to the time that the cargo is finally delivered. I agree with the decision of the learned county court judge.

Appeal dismissed.

Solicitors for appellants (defendants): *Wynne, Holme & Wynne, for H. Forshaw & Hawkins, Liverpool.*

Solicitors for respondents (plaintiffs): *Rowcliffes, Rawle & Co., for Hill, Dickinson & Co., Liverpool.*

(1) 15 P. D. 208.

T. L. M.

C. A.

1895

Nov. 14.

[IN THE COURT OF APPEAL.]

THE RED SEA.

Admiralty—Insurance, Marine—Abandonment—Cash Advances for Ship's Disbursements—Prepaid Freight—Rights of Underwriter on Ship.

The plaintiffs were insurers of the hull and machinery of the defendants' steamship whilst on a voyage from Pensacola to West Hartlepool. The vessel stranded at the entrance to the latter harbour, and was abandoned by the defendants to the plaintiffs as a constructive total loss, but the cargo of timber was subsequently delivered.

At Pensacola the sum of 1677*l.* 19*s.* 10*d.* had been advanced to the master by the charterers, under a clause in the charterparty, by which "Sufficient cash for ship's ordinary disbursements at port of loading to be advanced the master by the charterers or their agents at the (agreed) exchange, ship paying 2½ per cent. commission, including insurance. Master to give his draft, on owners or consignees, as required and customary to cover same, which shall be paid out of the first freight collected."

The defendants accepted from the consignees of the cargo, who held the master's draft for value, the freight less the above sum; but the plaintiffs claimed the gross freight as a benefit incident to the ship:—

Held, by the Court of Appeal (Lord Esher M.R., Lopes and Kay L.JJ.), affirming the decision of Bruce J. ([1895] P. 293), that the defendants, in accounting to the plaintiffs for the freight, were entitled to deduct the sum of 1677*l.* 19*s.* 10*d.*, as, by the terms of the charterparty, the cash advanced at Pensacola was equivalent to prepaid freight, and, as such, did not pass to the plaintiffs on the abandonment of the vessel and subsequent delivery of the cargo.

APPEAL by plaintiffs, the underwriters on the hull and machinery of the steamship *Red Sea*, against part of a decision of Bruce J. in favour of the defendants, the owners of the steamship, in an action upon a time policy of marine insurance to recover a balance of freight.

The facts are fully reported in the Court below (1) and were shortly that—

The *Red Sea* was chartered to carry a cargo of timber from Pensacola to a port in the United Kingdom as ordered on signing bills of lading, at an agreed freight per standard; and, by the charterparty, it was provided that (clause 13): "Sufficient

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(1) [1895] P. 293.

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cash for ship's ordinary disbursements at port of loading to be advanced the master by charterers or their agents at the exchange of $4·75, ship paying 2½ per cent. commission" (words "and cost of" struck out and word "including" substituted in writing) "insurance. Master to give his draft, on owners or consignees, as required and customary to cover same, which (together with draft for difference in freight, if any (1)) shall be paid out of the first freight collected. In the absence of fraud, of clerical or obvious errors, the signing by the master of any such draft shall be conclusive evidence of and authority for the advance of such cash for disbursements, charges and freight differences." (Clause 19.) "Freight to be paid as follows: one-third in cash on arrival, and the remainder on right delivery of cargo by good and approved bank bills payable in London at four months' date following, or in cash less 2 per cent. at owners' option."

By the bill of lading, which was indorsed to R. Wade & Co., to whom the property in the cargo passed, the cargo was required to be delivered at West Hartlepool "unto order of shipper or to their assigns, he or they paying freight for the said timber and deals, and all other conditions as per charter-party."

The charterers made disbursements for the ship at Pensacola amounting to 1677*l.* 19*s.* 10*d.*, which sum included $199·26 for "commission for advancing and disbursing @ 2½%, incl. ins." In respect of these disbursements the master signed and gave to the charterers a note dated May 19, 1894, in the following terms: "Five days after arrival at port of destination of the British steamship *Red Sea*, of which I am the master, now lying at Pensacola loaded with pitch pine and ready to sail for West Hartlepool, I promise to pay to the order of myself sixteen hundred and seventy-seven pounds 19*s.* 10*d.* sterling in approved banker's demand bills on London, value received, for necessary disbursements of my vessel at this port, for the payment of which I hereby pledge my vessel and freight; and my consignees at the port of destination are hereby directed to pay the

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(1) There was no difference between the chartered rate of freight and that of the bill of lading.

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amount of this obligation from the first amount of freight received, for account of my said vessel. Any other draft or obligation by me drawn at this port on said freight to be secondary to this." This note was indorsed by the master to the order of Price & Pierce of London, by whom it was indorsed for value to R. Wade & Co., by whom it was held when the cargo arrived at West Hartlepool.

The vessel sailed for West Hartlepool, and on June 16, in endeavouring to cross the bar at the entrace to that port, she took the ground and remained stranded; but, after a portion of the cargo had been put overboard to lighten her, she was towed off and taken into the harbour, where her cargo was discharged, the timber put overboard while the vessel was stranded being formed into rafts and towed into the harbour. The defendants gave the plaintiffs notice of abandonment, and subsequently, on conditions not material to this report, it was admitted by the plaintiffs that, in consequence of the stranding and damage thereby received, the ship became a constructive total loss on June 16.

The gross freight due under the bill of lading, at the chartered rate, after adding an agreed amount for one day's demurrage, was 4279*l.* 6*s.*; but the managing owners, acting on behalf of the defendants, on July 25 accepted 2227*l.* 19*s.* 5*d.* from R. Wade & Co. in settlement of their liability for freight, the balance, 2051*l.* 6*s.* 7*d.*, being made up of amounts admitted to be rightly deducted, except the above-mentioned sum of 1677*l.* 19*s.* 10*d.* and another sum of 339*l.* 4*s.* 9*d.*, which the learned judge in the Court below held to be improperly deducted, and in respect of which the parties did not appeal.

Bruce J. held that the defendants were entitled to deduct the sum of 1677*l.* 19*s.* 10*d.* advanced by the charterers at the port of loading as being subject to sea risk, capable of insurance, and equivalent to a prepayment of freight.

On appeal:

J. A. Hamilton, for the appellants (plaintiffs). On the possession of the ship with her cargo, the underwriters acquired all the advantages resulting from the completion of the voyage.

Subject, therefore, to the agreed deductions, consisting mainly of general average and particular charges, the defendants were bound to collect and pay to the plaintiffs 4279*l.* 6*s.*, the gross bill of lading freight. The sum of 1677*l.* 19*s.* 10*d.*, advanced in accordance with the terms of the charterparty to the master for ship's disbursements at Pensacola, was a personal loan to the shipowner to enable him to finance his ship at the port of loading, and, on the true construction of the charterparty, the intention was that the whole freight should be payable, and be collected, in England.

[LORD ESHER M.R. We are all agreed that this sum of 1677*l.* 19*s.* 10*d.* was equivalent to prepaid freight.]

Assuming that it was prepaid freight, as between shipowner and charterer, and that the draft given by the master constituted an equitable assignment of part of the chartered freight payable to whoever might be the holder of it, still the underwriter, who is not affected by the financial arrangements of the shipowner, is entitled to receive the freight to be collected from the consignees under the bill of lading. The voluntary abandonment of the ship involves a cession of all incidents attaching to it, and, therefore, includes the bill of lading freight, which goes to the underwriter, as owner of the ship at the time of the delivery of the goods at their destination. This was so laid down by Lord Ellenborough in *Case* v. *Davidson* (1), and to hold otherwise would be, in effect, to overrule that case. Similar principles are laid down in *Hickie* v. *Rodocanachi* (2), and this Court acted on these same principles when deciding against the claim set up in *Sea Insurance Co.* v. *Hadden.* (3)

The right of the underwriter to the freight is by way of payment for work and labour done, the bill of lading freight not being due to the underwriter by virtue of contract, but as the measure of the quantum meruit, and, in the same way, where a shipowner carries his own goods in his own ship so that there is no freight, the underwriter is entitled to a quantum meruit for the carriage of the goods when taking over the ship as a constructive total loss.

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(1) 5 M. & S. 79.

(2) 4 H. & N. 455.

(3) 13 Q. B. D. 706.

Joseph Walton, Q.C., and *Carver*, for the respondents (defendants). The underwriter, as owner of the ship, cannot get more on the delivery of the goods than the shipowner would have been entitled to receive for their carriage had he remained owner, and the shipowner was not entitled to anything more than the chartered freight less that part of it which had been prepaid in Pensacola.

The fact that the draft had been given by the master secured this result, for, though it happened that the consignee of the goods was the holder of it, the effect would have been the same had it been in third hands, as the holder would have put a stop on the freight, and so prevented the consignee paying this part of the freight to anybody but him.

[They were stopped by the Court.]

LORD ESHER M.R. I should hesitate before I ventured to differ from a case which has been decided by so great a mercantile judge as Lord Ellenborough, but I think that the counsel for the appellants has misconstrued *Case* v. *Davidson* (1), and the cases which followed it.

This is an action between underwriters of the ship and the shipowners, and the dispute arises after the ship has been a constructive total loss and the abandonment has been accepted by the underwriters. Now, what is the effect of that as between the underwriters and the shipowners, according to the case of *Case* v. *Davidson* (1) and all the others? It seems to me that Lord Ellenborough pointed out distinctly in that case first of all that the ship is to be considered as having passed to the underwriters after the abandonment has been accepted, as from the time when the damage occurred to her which entitled the shipowners to abandon her. From that time the underwriter is entitled to everything which that ship, then being his, can earn; that is to say, that he can earn by her as being her owner. That is what he is entitled to, and that is what Lord Ellenborough has said. He is not entitled to anything that has been earned by the use of that ship before she was his ship. Now take the simple case of a ship, before the loss or damage, having been chartered or filled with cargo on bills of lading, the freight to be payable on the arrival of the ship and delivery of the goods. In such a case, at the time of the loss the ship has earned nothing. He who was her owner up to the time of the loss has earned nothing by the use of the ship. But he who is owner when she arrives is entitled, as owner, to receive the freight; that is to say, he is entitled as owner by the delivery of the cargo at the port of destination to the freight for the use of the ship during the whole voyage. He obtains that freight by the use of the ship, and he obtains it in virtue of what the ship does when she arrives at her destination, and when she is his ship. That is the whole of the law of abandonment.

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(1) 5 M. & S. 79.

In this case the ship was lost at a place a short distance from the port of destination. The underwriter therefore was entitled to receive all the freight which would be earned by the ship by delivery of the goods at the port of destination. But he was not entitled to any other freight, and if, therefore, there was freight prepaid, paid before the time when she became his ship, which the charterers could not have got back whether the ship was lost before delivery of the cargo or not, that freight is not earned by him by the use of the ship. It is earned by the man who got it, and who was paid it at the time it was paid when he was the owner of the ship—that is, in this case, by the shipowner. Now the shipowner here, according to the true construction of this charterparty, as between him and the charterer, was entitled to part of that freight by way of advance at the commencement of the voyage and before the ship started. That was to be treated, as between him and the charterer, as prepaid freight—that is, freight paid and not to be got back again. To insure that freight is a perfectly well known practice on the part of the person who would lose if the ship was lost. That is not the shipowner. That freight is safe in his pocket whatever happens to the ship. Therefore here, as between the shipowner and charterer, what the shipowner would be entitled to be paid, if he were still the owner of the ship when she arrived at the port of destination and delivered her cargo, would be the charterparty freight coming due by reason of the arrival of the ship at that place and the delivery of the cargo. That is, in other words, the difference between so much of the freight as he had already been paid and so much as would be due to him by reason of the arrival of the ship. So, if the shipowner and charterer had been there to settle the matter, the shipowner would have said to the charterer, "You are bound to pay me the charterparty freight, less the amount you have already paid." That is to say, the difference between the prepaid freight and the charterparty freight. Here the shipowner chartered the whole ship to the charterer, and the captain, no doubt, was bound to sign bills of lading, and to sign them in the name of the owner whose captain he was. But that bill of lading freight, although he would collect it from the consignees—that is, from the bill of lading owners—he could not put it in his pocket. From them he would be entitled to receive it, but he would hold it as trustee for the charterer, because the charterer was the person who, as between the shipowner and the charterer, was to be entitled to the bill of lading freight. But what would happen? He would hold it as trustee for the charterer. But how much would he hold as trustee? Only that which was over and above what he was entitled to keep for his own charter freight. What he was entitled to receive for his own charterparty freight was the difference between what he had already been paid and the charterparty freight. If the bill of lading freight exceeded the charterparty freight, he would have been bound to hand over the difference to the charterer. But in this case there was no such circumstance, and therefore when the ship arrived, after the loss, the only thing to be received was the difference between the charterparty freight and the prepaid freight. If the shipowner had been there, he would have received that sum; he would have paid himself any difference between the two, and would have had nothing over to pay the charterer. What he would have been entitled to receive, therefore, was that difference. But he could not receive that difference, because he did not earn that difference by the use of the ship. He had ceased to be the owner when the ship did earn that. Who did earn that? Why, the underwriter. The underwriter earned that difference by reason of his being the owner of the ship when she arrived. But he earned nothing more by reason of being the owner of the ship. The so-called draft, which was signed by the captain alone, is not a negotiable bill, if it can bind his owners at all, it merely binds them by way of pledging the freight, and has nothing whatever to do with the matter. It makes no difference as between the rights of shipowner and underwriter.

I am not venturing to differ from Lord Ellenborough, and certainly not attempting to contravene what has been said in some cases by Lord Blackburn; nor am I differing from what has been said by myself in this Court in holding that the judgment of Bruce J. was right and in accordance with those cases, and, therefore, that the appeal should be dismissed.

LOPES L.J. The shipowner in this case abandoned the ship as and for a constructive total loss. On the abandonment the ship passed absolutely to the underwriters, and the underwriters then and there were entitled to stand in the shoes of the shipowner. I mean by that the same shoes which he wore at the time of the abandonment. They were entitled to all that the ship afterwards earned, and entitled, therefore, to all unpaid freight, because that freight was not earned and did not become due until the arrival of the ship at her destination. Now, the underwriters are entitled to so much; but, in my opinion, they were not entitled to the freight which had been advanced before the abandonment. It is said that in so holding we are differing from certain cases decided by certain eminent judges. In my opinion we are not differing. I think we are deciding in accordance with those cases, although probably none of them may directly raise the point with which we are now dealing. The first of those cases is that of *Case* v. *Davidson*. (1) There is also the case of *Stewart* v. *Greenock Marine Insurance Co.* (2), and there are valuable remarks of Lord Blackburn in the case of *Keith* v. *Burrows*. (3) We are not deciding contrary to any of those cases, but, in my opinion, in accordance with them. I think, therefore, this 1677*l*. 19*s*. 10*d*. was properly deducted.

(1) 5 M. & S. 79.

(2) 2 H. L. C. 159; 1 Macq. 328.

(3) 2 App. Cas. 636.

C. A.
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THE RED SEA.

I am asked to say by my brother Kay that he entirely agrees with the judgments of the rest of the Court.

Appeal dismissed.

Solicitors for appellants (plaintiffs): *Rowcliffes, Rawle, & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for respondents (defendants): *Batesons, Warr, & Wimshurst, Liverpool.*

T. L. M.

1895
Oct. 24, 25.

THE LORD BANGOR.

Admiralty — Collision — Tug and tow — Fog — Stopping — Regulations for Preventing Collisions at Sea, 1884, *art.* 18.

By art. 18 of the Regulations for Preventing Collisions at Sea, "Every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed, or stop and reverse, if necessary."

A four-masted barque, in tow of a tug, in a dense fog at night in the St. George's Channel, was going at the rate of 1½ knots an hour, and did not stop, though she heard the whistle of a steamer on her port side gradually nearing and indicating danger. The steamer was proceeding at about 2½ knots an hour, and heard the whistle of the tug crossing her bows from starboard to port. She ported and reversed her engines on seeing the barque, but struck her at right angles on her port quarter, and was held to blame under art. 18 for not stopping sooner.

Held, by Sir F. H. Jeune, President, that the barque was not also to blame for not stopping, as a tug encumbered with a tow is not to be deemed a steamship for all purposes under the rules, and the speed was as slow as was possible consistently with keeping the tow-rope sufficiently taut to prevent the risk of the two vessels being drawn together, and the propeller of the tug being fouled.

ACTION of damage by collision. The plaintiffs were the owners of the barque *Clan Galbraith;* the defendants were the owners of the screw steamship *Lord Bangor*.

The facts, so far as material, were that:—

On May 12, 1895, the *Clan Galbraith*, a four-masted barque of 1983 tons register, with a crew of sixteen hands, was proceeding in tow of the tug *Flying Vulture* from Dublin to Swansea in ballast, and at about 4.30 A.M. was near the Smalls in the St. George's Channel on a course S.E. by E., making from one to two knots an hour. There was a light breeze from the S.W., and, on account of dense fog, the tug was sounding her whistle, and the tow her fog-horn, when the whistle of a steamer was heard, by those on board the tow, on the port beam, apparently a long way off. It continued to be heard getting nearer, and, after a short time, a steamship was seen on the port quarter about a ship's length off, which coming on under a port helm, struck the port side of the *Clan Galbraith* before the break of the poop, and, striking her a second time, did her damage.

The steamer proved to be the *Lord Bangor* of 1911 tons net, and 2991 tons gross register, with engines of 300 horse-power nominal, and 23 hands, from Dublin to Barry Docks, in water-ballast. On the fog coming on, her master decided to go outside the Smalls, and, at the material time, the vessel was heading W.S.W., making about 2½ knots per hour, and sounding her whistle, when those on board her heard the whistle of, but did not see, the tug crossing her bow from starboard to port. They heard no fog-horn from the tow, but at about a ship's length saw the *Clan Galbraith* crossing their bows at about right angles from starboard to port. The helm was put hard-a-port, and the engines reversed full speed; but the collision occurred.

The main charge made by the plaintiffs against the defendants, was that the *Lord Bangor* failed in due time to stop her engines, and for her neglect in this respect she was found under art. 18 (1) alone to blame.

The main charges brought by the defendants against the plaintiffs were: First, that the *Clan Galbraith* improperly neglected to order the tug to stop, that is, that she and her tug failed to comply with art. 18 (1), and the case is reported on this point. Secondly, that the *Clan Galbraith* did not give any warning of her presence. It was admitted that whether bound to do so or not under the rules, it was a seamanlike precaution which a sailing-ship in tow of a tug in a fog was bound to take, and the Court found as a fact that she was sounding her fog-horn. Thirdly, that the *Clan Galbraith* was being towed with an improper scope of tow-rope, and improperly failed to shorten her tow-rope on entering the fog; but the Court, on the advice of the Elder Brethren of the Trinity House, held that the 100 fathoms scope of tow-rope with which the *Flying Vulture* was towing the *Clan Galbraith* was not, in the circumstances, improper.

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(1) Regulations for Preventing Collisions at Sea, 1884, Art. 18: "Every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed, or stop and reverse, if necessary."

Aspinall, Q.C., and *Butler Aspinall*, for the plaintiffs, the owners of the *Clan Galbraith*. The *Lord Bangor* must be to blame for not stopping in accordance with the provisions of art. 18, and, if the *Clan Galbraith* ought also to have stopped under the same portion of that rule, then it is submitted that the evidence shews that that vessel and her tug practically complied with the rule, as they were going as slowly as the circumstances permitted, for, admitting that tug and tow are to be deemed a steamer for some purposes, such as obeying the crossing rule, or giving way to a steamer on the starboard side, still a tug, encumbered with a tow, cannot be held to be a steamer for all purposes, as the only way in which, for example, a tug can get a sailing vessel out of the way is by going ahead. A tug encumbered with a tow sufficiently obeys art. 18 when she goes as slowly as it is possible for her to do consistently with the necessity of keeping some little steerage-way, otherwise the propeller of the tug will be fouled by the slack of the rope, which by its own weight would cause the tow to overrun the tug.

Sir Walter Phillimore, and *D. Stephens*, for the defendants, the owners of the *Lord Bangor*. The *Clan Galbraith* did not comply with art. 18, as she was bound, under that rule, as interpreted in *The Ceto* (1) and *The Lancashire* (2), to stop. It was recognised in *The American and The Syria* (3) that tug and tow are a steamer under the rules, and in *The Knarwater* (4) the obligation on tug and tow to stop was distinctly emphasised in this Court, and there was no appeal against that part of the decision. The cases of *The Englishman*

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(1) 14 App. Cas. 670.

(2) [1894] A. C. 1.

(3) L. R. 6 P. C. 127.

(4) 63 L. J. (Ad.) (N.S.) 65.

and The Australia (1) and *The Niobe* (2) are to the same effect.

[THE PRESIDENT. Assuming that, on the evidence, the tug and tow were not going more than 1½ knots, and that that was the slowest that the tug, encumbered with the tow, could go, could the Court find the tug and tow to blame?]

Yes, for if a speed of 1½ knots will lead the tug and tow straight into a collision, they must not go at this speed. Here the combined length drawn at right angles across the bows of the *Lord Bangor* was 1017 feet, and this was the cause of the collision.

Aspinall, Q.C., in reply. In the case of *The Knarwater* (3), the tug and tow were going at a speed of 2½ knots, and they were held to blame for not going slower, which they obviously could do. All the other reported cases shew a speed which could have been decreased, but here the speed was as slow as it was possible to go.

[The other arguments of counsel as to the courses, the blowing of the whistle and of the foghorn, are omitted as not material for the purposes of this report.]

SIR F. H. JEUNE, PRESIDENT. The duty imposed by art. 18 on vessels in a fog to stop is stated by Lord Herschell in *The Ceto* (4) thus: "When a steamship is approaching another vessel in a dense fog she ought to stop, unless there be such indications as to convey to a seaman of reasonable skill that the two vessels are so approaching that they will pass well clear of one another." That is to say, as, indeed, the case of *The Ceto* (4) does say, that art. 18 in these circumstances covers the matter, and the principle which it lays down imposes a duty upon a steamship to stop. This principle I have to apply in this case to both these vessels. I will take first the case of the defendant vessel, the *Lord Bangor*. [The learned judge discussed the evidence, and found that the foghorn of the *Clan Galbraith* was sounded and might have been heard by the *Lord Bangor*, and continued:—]

I should be unwilling, however, to decide the matter solely on

(1) [1894] P. 239.

(2) [1891] A. C. 401.

(3) 63 L. J. (Ad.) (N.S.) 65.

(4) 14 App. Cas. 670, at p. 695.

1895

THE LORD BANGOR.

The President.

that point, although it would be sufficient to do so; but assuming for a moment that the *Lord Bangor* was not in fault in not hearing the foghorn, is she then relieved from liability? I think she is not, because it seems to me that the obligation which the learned judges in the House of Lords have laid down applies in this case. It is perfectly true, as was pointed out by counsel for the *Lord Bangor*, that the sound of the steamer's whistle, which was heard from time to time, had passed, in fact, the bows of the *Lord Bangor* by a considerable distance at the time of the collision, and therefore if it had been the tug alone in question the *Lord Bangor* would have gone clear. Nay, more, it is no doubt the case that even if the tug had been of considerably greater length than she was, as long perhaps as any vessel usually is, the *Lord Bangor* would, as it happened, have gone clear. But I do not think that is the way to look at it. One must go back a little earlier. Taking the courses of the vessels, there is no doubt that the *Lord Bangor* heard a good many whistles from the tug on her starboard bow, and knew, therefore, that there was a steamer gradually drawing across her bow, and there must have been a time when it must have been borne in upon the mind of her captain that so far from there being indications of safety, which are what the law requires should be presented, there were indications pointing in the contrary direction. Therefore, at that stage he ought to have known that there was danger, and he certainly had no right to draw the inference that there was not. He ought, following the obligation which the law imposes, to have stopped. I cannot get away from this, that, apart from any question of hearing the foghorn, on hearing the whistles it became his duty to stop. It appears to me clear, and the view of the Trinity Masters coincides, that the *Lord Bangor* ought to have stopped. To the Trinity Masters I put the exact question that was put in the case of *The Lancashire* (1), and they tell me that in these circumstances, in their opinion, the *Lord Bangor* was to blame.

Now, as to the other vessel. What is good for one vessel must be good for the other, and if the *Lord Bangor* heard

(1) [1894] A. C. 1.

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indications which ought to have led her to suppose there was risk of collision, those on the *Clan Galbraith* and her tug must have had similar indications. Of course the circumstances are not the same, because in their original story those on the *Clan Galbraith* put the case as having heard a whistle on their beam, which continued on their beam. No doubt, therefore, their position was not the same as that of a vessel which heard a whistle on her starboard bow, gradually drawing across her bows. It seems to me clear, however, that the indications were such as to shew that the vessels were approaching one another, and that there might be danger, and if the whistle was heard by the master of the *Clan Galbraith* on her port beam, keeping the same bearing, the position could not be that of vessels passing clear. That is the view the Trinity Masters take. Then comes a further question, which I confess gives me some little trouble, and on which I desired to consult the Trinity Masters, and to act mainly on their guidance. Assuming, as I now assume, that if the tug and tow together had been a steamer, according to the rule she ought to have stopped, does the same obligation rest on the tug and her tow? Now, no one can doubt that the case of *The Knarwater* (1) shews that many of the ordinary obligations of a steamer are shared by a tug and her tow, because to a great extent the tow and tug together partake of the nature of a steamer. They are bound in many cases by the same rules, and there are a great many things which a steamer ought to do which a tow and tug can and ought to do. Is that true in this particular case? Assume that the obligation on a steamer was to stop, is there anything in the nature of things in the case of a tow and tug which makes a modification of that rule essential? On this point I have consulted the Trinity Masters, and they tell me that they think there is. Of course a tug can do a good many things with her tow in the way of stopping and altering her course. If she is approaching another vessel she can tow ahead or astern, or a variety of things of that kind, but where it is a matter of stopping, apart from the question of casting off, is it practicable for a tug and tow to reduce themselves to a condition of absolute standstill? The Trinity Masters tell me that in their judgment it is not, and one can see that that is the common sense of the matter. If a tug absolutely stops what happens? The weight of the wire rope will draw the tow up to the tug, and if it be a screw there will be risk of fouling the propeller. Then it becomes necessary for the tug to go ahead a little bit, and she must draw the tow after her, and so you cannot obtain a position of absolute standstill. In this case was the movement of the tug and tow more than was necessary, they being a tug and tow? The facts appear clear that it was about as slow as it possibly could be. The helmsman said it was so slow that there was practically no movement, and the captain said they had no way on at all. It is clear that the movement was extremely slow, partly because the stem of the *Lord Bangor* sustained no damage at all, and partly because it is clear, on the story of the *Lord Bangor*, that, when she was something like a ship's length off, her head was pointed before the foremast of the *Clan Galbraith*, and though she put her own helm hard-a-port and reversed her engines, she only struck the *Clan Galbraith* somewhere near the jiggermast, which was no great distance from the point to which she headed when she first ported. So that as the *Lord Bangor* was going at some, though a low speed, it appears to me that the *Clan Galbraith* was scarcely moving through the water.

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(1) 63 L. J. (Ad.) (N.S.) 65.

It seems to me that the tug and tow were going as slow as they could if the rope was to be kept fairly taut. No doubt that condition of slowness was not brought about by their having heard the whistle; but if it existed before, owing to the fog or any other cause, they had already done all that they could do in the matter, and to go more slowly was practically impossible. Under these circumstances I think it follows that the *Clan Galbraith* is not to blame, as she did not infringe art. 18, and that the *Lord Bangor* is alone to blame.

Solicitors for plaintiffs: *Hollams, Sons, Coward & Hawksley.*

Solicitors for defendants: *Thomas Cooper & Co., for Randall & Cay, Cardiff.*

T. L. M.

CARTER *v.* CARTER.

1895
Nov. 11.

Divorce—Judicial Separation—Practice—Alimony pendente lite—Injunction—Matrimonial Causes Act, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 22.

Where, in a suit by a wife for judicial separation, an order for alimony pendente lite had been made against the husband, the Court refused to restrain the husband from dealing with certain of his property.

Motion by the petitioner, the wife, in a suit for judicial separation, for an injunction restraining her husband, the respondent, from dealing with certain leasehold property. She stated on affidavit that he was selling this property and intended to leave the country. He denied these statements on affidavit. It did not appear that he was in default with respect to payment of the alimony.

Rooth, for the petitioner. It is competent to the Court to grant an injunction. [He referred to *Sidney* v. *Sidney* (1), *Noakes* v. *Noakes and Hill* (2), and *Newton* v. *Newton.* (3)]

Barnard, for the respondent. Under s. 22 of the Matrimonial Causes Act, 1857 (4), the Court has to follow the Ecclesiastical practice as to alimony pendente lite. An injunction could not have been obtained in an Ecclesiastical Court.

Gorell Barnes J. The motion must be dismissed. The case for the petitioner is not made out on the affidavits, and the decisions which have been cited do not support the proposition contended for by her counsel. I should add that a similar application appears to have been refused in *Hyde* v. *Hyde.* (5)

Solicitors: *Romain; A. J. Evans.*

H. D. W.

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(1) 17 L. T. (N.S.) 9.

(2) 4 P. D. 60.

(3) 11 P. D. 11.

(4) By s. 22 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), "In all suits and proceedings, other than proceedings to dissolve any marriage, the said Court shall proceed and act and give relief on principles and rules which, in the opinion of the said Court, shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have heretofore acted and given relief, but subject to the provisions herein contained, and to the rules and orders under this Act."

(5) 4 Sw. & Tr. 80.

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Nov. 18, 25.

NEWTON *v.* NEWTON.

Divorce—Dissolution of Marriage—Permanent Alimony—Practice—Injunction—Matrimonial Causes Act, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 32.

Where, a wife having obtained a decree nisi for the dissolution of her marriage, an order had been made pursuant to s. 32 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), that the husband should secure a sum for her maintenance, and that, for that purpose, it should be referred to one of the conveyancing counsel of the Chancery Division to draw a deed, the Court granted an injunction restraining the husband, his servants and agents, from dealing with certain of his property until the execution of the deed.

Motion to confirm the report of the registrar on a wife's petition for maintenance.

A decree nisi had been made for the dissolution of the marriage on the ground of the adultery and cruelty of the husband. It appeared that he held shares and stock of the value of about 16,000*l.* The registrar recommended that he should be ordered to secure a sum of 5000*l.*, pursuant to s. 32 of the Matrimonial Causes Act, 1857. (1)

Priestley, for the wife, applied for an injunction to restrain the husband from dealing with the fund. [He cited the decision of Malins V.C. in *Sidney* v. *Sidney* (2), and the passage in the judgment of Sir J. Hannen in *Newton* v. *Newton* (3) in which that decision is approved.]

Gorell Barnes J. The application may be granted, on the authority of *Sidney* v. *Sidney*. (2)

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(1) By s. 32 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), "The Court may, if it shall think fit, on any such decree" (i.e., for the dissolution of marriage) "order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable, and for that purpose may refer it to any one of the conveyancing counsel of the Court of Chancery to settle and approve of a proper deed or instrument to be executed by all necessary parties."

(2) 17 L. T. (N.S.) 9.

(3) 11 P. D. 11, at p. 13.

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NEWTON
v.
NEWTON.

Gorell Barnes J.

The order of the Court was as follows: "It is ordered that the said report be confirmed, and that the respondent do secure to the petitioner the sum of 5000*l.* for her maintenance, and that, for that purpose, it may be referred to one of the conveyancing counsel of the Chancery Division to draw a deed; and it is further ordered that the respondent, his servants and agents, be restrained, until the execution of the said deed, from parting or otherwise dealing with his interest in the National Provincial Bank of England, the British and Australia Trust and Loan Company, and the Metropolitan Surplus Lands Stock, as set forth in the affidavit of the solicitor to the petitioner."

Solicitors: *Bower & Lawford.*

H. D. W.

PARRY *v.* PARRY.

1895
Dec. 6, 9, 18.

Queried. RICHARD
v. RICHARDS
[1952] P. 30

Divorce—Dissolution of Marriage—Conduct conducing to Adultery—Verdict of Jury—Discretion—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 31.

On a petition by a husband for the dissolution of his marriage, adultery by the wife was admitted, but the jury found that the petitioner had been guilty of "wilful neglect or misconduct conducing to the adultery" within the meaning of s. 31 of the Matrimonial Causes Act, 1857.

It appeared that the parties were domestic servants. The respondent had had an illegitimate child by the petitioner before the marriage. During their married life, between 1883 and 1894, the petitioner was abroad for long periods with his master; and the respondent meanwhile kept a lodging house, the petitioner remitting to her regularly an adequate weekly allowance. The parties lived unhappily owing to the enforced separation. In 1894 a child was born, the result, as the respondent admitted, of the adultery imputed to her in the petition.

The Court, notwithstanding the verdict of the jury, pronounced a decree nisi for the dissolution of the marriage, but directed that it should not be made absolute until the petitioner had secured to the respondent, by a proper deed, the annual sum of 20*l.*, payable in equal monthly instalments, commencing from the date of the decree nisi, during their joint lives, dum sola et casta vixerit.

FURTHER consideration before Gorell Barnes J. The facts and arguments are stated in the judgment.

Priestley (*Inderwick, Q.C.*, with him), for the petitioner,

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referred to *Davies* v. *Davies and Hughes* (1); *Cunnington* v. *Cunnington and Noble* (2); *Langworthy* v. *Langworthy* (3); *A.'s Divorce Bill, Second Reading.* (4)

Marshall Hall, for the respondent, referred to *Edwards* v. *Edwards and Francis* (5) and *Hawkins* v. *Hawkins and Hope.* (6)

Cur. adv. vult.

GORELL BARNES J. In this case, which was tried before me with a common jury last week, the petitioner sought to obtain a dissolution of his marriage with the respondent in consequence of her adultery with a man unknown, which resulted in the birth, on July 27, 1894, of a child, of which the petitioner was not the father. The respondent admitted this; but pleaded that the adultery so committed was conduced to by the conduct of the petitioner. I was satisfied, upon the evidence before me, that the respondent had been guilty of the adultery which resulted in the birth of the child; and the only question which was left for the consideration of the jury was whether or not the petitioner had been guilty of "wilful neglect or misconduct conducing to the adultery."

The jury found that he was so guilty; and the case was reserved for further consideration before me as to whether or not I should, under the circumstances, exercise my discretion by pronouncing a decree nisi notwithstanding the verdict of the jury.

On the further consideration before me it was urged by the petitioner's counsel that I ought, under the circumstances, to make a decree nisi without any conditions; whereas the counsel for the respondent urged that no decree ought to be made, and that, if any were made, it should only be pronounced on the terms of the petitioner making an adequate provision for his wife.

A number of cases were cited to me in which the Court had either exercised or refused to exercise its discretion in pronouncing decrees nisi. The 31st section of the Matrimonial Causes Act, 1857, is as follows (1): [The learned judge read the section.]

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(1) 32 L. J. (P. M. & A.) 111.

(2) 28 L. J. (P. & M.) 101.

(3) 11 P. D. 85.

(4) 12 App. Cas. 364, at p. 366.

(5) [1894] P. 33.

(6) 10 P. D. 177.

In several cases the Court has exercised its discretion by pronouncing a decree in a petitioner's favour where he has committed adultery under exceptional circumstances, such, for instance, as adultery committed under a mistake of fact, or a mistake of law, or under compulsion. The Court has also in some cases exercised its discretion in favour of a petitioner where he has been found guilty of cruelty. In *Pearman* v. *Pearman and Burgess* (2) the jury found that the respondent was guilty of adultery and that the petitioner had been guilty of cruelty, but a decree nisi was pronounced. In *Badham* v. *Badham and Gorst* (3), where the wife had previously obtained a judicial separation on account of her husband's cruelty, the husband subsequently obtained a decree nisi for the dissolution of his marriage on account of his wife's adultery with the co-respondent. In *Edwards* v. *Edwards and Francis* (4), where the jury found that the respondent and the co-respondent had committed adultery and the petitioner had been guilty of cruelty towards his wife, a decree nisi was pronounced with the provision that the decree should not be made absolute unless the petitioner secured to his wife by deed a certain allowance for her maintenance. In *Newman* v. *Newman* (5), upon a petition for dissolution of marriage, it was proved that the husband had been guilty of incestuous adultery, and the Court also found that the petitioner had been guilty of unreasonable delay in presenting the petition; but, notwithstanding that finding, the Court exercised its discretion in favour of the petitioner and pronounced a decree nisi.

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(1) By the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 31, "In case the Court shall be satisfied on the evidence that the case of the petitioner has been proved, and shall not find that the petitioner has been in any manner accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then the Court shall pronounce a decree declaring such marriage to be dissolved; provided always that the Court shall not be bound to pronounce such decree, if it shall find that the petitioner has during the marriage been guilty of adultery, or if the petitioner shall, in the opinion of the Court, have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery."

(2) 1 Sw. & Tr. 601.

(3) 62 L. T. (N.S.) 663.

(4) [1894] P. 33.

(5) L. R. 2 P. & D. 57.

I am not aware of any reported case, and none were cited to me, in which the Court has exercised its discretion in favour of a petitioner where he has been found guilty of conduct conducing to his wife's adultery; but it is clear from the wording of the section, and from the distinction drawn in it between connivance and conduct conducing to adultery, that the Court may, even in such a case, exercise its discretion in the petitioner's favour, just as it may do so and has done so in cases such as those to which I have above referred, which are dealt with by the earlier parts of the proviso in the section. It is obvious that, if a husband is guilty of conduct conducing to his wife's adultery, the Court would not be readily disposed to pronounce a decree in his favour, as he is a party to his own wrong. But conduct conducing to adultery may vary greatly in degree. There may be such conduct as would lead necessarily and proximately to adultery; and, on the other hand, there may be conduct which so remotely conduces to adultery that, while it may be said that there is some slight evidence that it did conduce to adultery, the conduct may yet be rather a causa sine quâ non than a causa causans. In cases at the first extreme, the Court could not reasonably be asked to pronounce a decree in the petitioner's favour, unless, perhaps, there were some very exceptional circumstances; but, in cases approaching the other extreme, there may not be sufficient in the petitioner's conduct to cause the Court to refuse to exercise its discretion in his favour. If the present case had been tried before me without a jury, I doubt whether I should have found that the petitioner was guilty of conduct conducing to his wife's adultery, although there may have been some evidence to support the finding of the jury. Taking the finding as it stands, I hold that I am at liberty to consider the weight to be attached to it. In my opinion, then, if the petitioner's conduct conduced to his wife's adultery, the case was rather one of the latter, than of the former kind to which I have just referred, and the verdict may be interpreted on this basis.

The petitioner and the respondent were both domestic servants at the time of their marriage, which took place in 1883. For a time they were both in service. Then they were out of service for a short period. Afterwards the petitioner obtained a situation as butler, which he has retained for ten or eleven years, and his wife took lodgings where she was known as the petitioner's wife, and was visited by the petitioner, who supplied her with from 15*s.* to 1*l.* a week. Two children were born, one in 1884 and one in 1891. The petitioner was away for long periods abroad with his master, but his remittances to his wife seem to have been regularly kept up. Latterly the respondent seems to have taken to drink, and in 1894 she gave birth to an illegitimate child, upon which these proceedings were instituted.

The points most pressed against the petitioner were that he and the respondent had had an illegitimate child before marriage, and that he had not sufficiently looked after her, especially during the latter part of the time. He seems to have had a doubt as to the paternity of the child born in 1891, which she states positively is his; and an unsatisfactory state of things had existed between them for some time before her adultery, which might not have existed had they been living together. But it is impossible to leave out of consideration the fact that marriages between domestic servants may result in prolonged separation, just as in the case of sailors and others who have to be away for lengthy periods, during which they can do little more than make adequate provision for their wives.

Although, then, the conduct of the petitioner in this case may, as the jury has found, have conduced to his wife's adultery, it has not, in my opinion, conduced thereto to such an extent as to prevent me from exercising my discretion in his favour. I am of opinion, however, that the petitioner ought not to obtain his decree without making some provision for his wife; and, after due consideration, I have come to the conclusion that a decree nisi must be pronounced, but I direct that it shall not be made

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absolute unless and until the petitioner has secured to the respondent, by a proper deed, the annual sum of 20*l.* payable in equal monthly instalments, commencing from the date of the decree nisi, during their joint lives, dum sola et casta vixerit. There must also be the usual order for the wife's costs. I understand the petitioner to ask for the custody of the two children born in 1884 and 1891 respectively, and I order that he do have the custody of these children.

Solicitors for petitioner: *Martyn & Martyn.*
Solicitors for respondent: *Pilgrim & Phillips.*

H. D. W.

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Nov. 21, 22, 25, 26, 27; *Dec.* 17.

[IN THE COURT OF APPEAL.]

THE GAS FLOAT WHITTON No. 2.

Admiralty—Salvage—Jurisdiction—County Court—Gas Float—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *ss.* 2, 458, 476—*County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *s.* 3.

The plaintiffs obtained a salvage award in a county court having Admiralty jurisdiction for services rendered to a gas float adrift in the tidal waters of the Upper Humber. The structure was of iron, boat-shaped, and contained gas, which by its own elasticity supplied day and night for about six weeks the light raised above it. A Divisional Court sitting in Admiralty affirmed the award on the ground that though the gas float was not (as found by the county court judge) a "ship" or "wreck" within the meaning of ss. 2 and 458 of the Merchant Shipping Act, 1854, so as to be a subject of salvage under the latter section, there was Admiralty jurisdiction under s. 476 of that Act as such a structure, used in connection with navigation, and exposed in the ordinary course of its use to the perils of the sea would have been within the jurisdiction of the Admiralty if adrift upon the high seas, and was therefore, by virtue of that section, also within the jurisdiction of the Admiralty when within the body of a county ([1895] P. 301). On appeal:—

Held, by the Court of Appeal (Lord Esher M.R., Lopes and Kay L.JJ.), reversing the decision of the Divisional Court, that the structure in question, not being a ship or part of a ship or of her apparel or cargo, or the wreck of them, was not a subject-matter in respect of which a salvage claim could be maintained in the High Court of Admiralty, and was therefore not within the jurisdiction of a county court under s. 3 of the County Courts Admiralty Jurisdiction Act, 1868.

Appeal by defendants, the corporation of the Trinity House of Hull, against a decision of a Divisional Court, sitting in

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THE GAS FLOAT WHITTON No. 2.

Admiralty (1), affirming an award of salvage in a county court in favour of the plaintiffs, for services rendered to a gas float the property of the defendants.

On December 22, 1894, the plaintiffs, Jesse Wells and Edward Hall, waterside men, observed that the gas float "Whitton No. 2," stationed near Brough, in the Upper Humber, was adrift. The structure, which was of iron, boat-shaped, and worth 600*l*., contained gas which, by its own elasticity, supplied day and night for about six weeks the light raised above it. A gale of wind was blowing at the time, and the gas float drove towards the Lincolnshire coast, first touching Reeds Island, and eventually taking the ground near a point with a rocky bottom, to which, it was alleged, the tide would have carried it. The plaintiffs fastened ropes to it, gave it a lead away from the rocks, and so held it until the 23rd, when the Trinity yacht came. After several efforts, in which the plaintiffs aided, the Trinity yacht succeeded, on the 29th, in getting it off.

On January 21, 1895, the plaintiffs instituted an action for salvage, in the sum of 60*l*., in the county court of Yorkshire, holden at Kingston-upon-Hull. The defendants objected to the jurisdiction; but on April 5 the learned county court judge gave judgment for the plaintiffs, holding that the gas float was a proper subject of salvage within the jurisdiction of a county court having Admiralty jurisdiction (2), as being an automatic lightship stored with gas for purposes useful to navigation, and, on the principles laid down in *The Mac* (3), coming within the meaning of ss. 2 and 458 of the Merchant Shipping Act, 1854. (4) He also held that, at the material time, the gas float came within the definition of "wreck" as used in the latter section of the same statute, and on the ground that the

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(1) Reported [1895] P. 301.

(2) County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71):—

Sect. 3: "Any county court having Admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and determine, subject and according to the provisions of this Act, the following causes (in this Act referred to as Admiralty causes):

"(1.) As to any claim for salvage—any cause in which the value of the property saved does not exceed one thousand pounds, or in which the amount claimed does not exceed three hundred pounds."

(3) 7 P. D. 126.

(4) These sections are set out in the judgment of the Court of Appeal.

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services were meritorious, though not attended with any risk, he awarded the plaintiffs the sum of 15*l*.

The defendants appealed to the Probate, Divorce and Admiralty Division of the High Court; and on August 8 the Divisional Court (Sir F. H. Jeune, President, and Bruce J.) affirmed the award on the ground that, though the gas float was not a "ship" or "wreck" within the meaning of ss. 2 and 458 of the Merchant Shipping Act, 1854, so as to be a subject of salvage under the latter section, there was Admiralty jurisdiction under s. 476 of that Act, as such a structure, used in connection with navigation and exposed in the ordinary course of its use to the perils of the sea, would have been within the jurisdiction of the Admiralty if adrift upon the high seas, and was therefore, by virtue of that section, also within the jurisdiction of the Admiralty when in the body of a county.

On appeal:—

Sir Walter Phillimore and *F. Laing*, for the appellants (defendants).

Pyke, Q.C., Butler Aspinall, and *Arthur Pritchard*, for the respondents (plaintiffs).

The arguments of counsel and the material portion of the statutes bearing on the question of jurisdiction fully appear from the judgment. In addition to the cases therein mentioned, the following cases, statutes, and text-books were referred to.

By the appellants: *The Johannes* (1); *The Willem III.* (2); Godolphin's View of the Admiral Jurisdiction, 2nd ed. pp. 43 to 50; 13 Rich. 2, st. 1, c. 5; Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 414. By the respondents: *The Aquila* (3); *The King* v. *Property Derelict* (4); *The Boiler ex Elephant* (5); *Everard* v. *Kendall* (6); *The Zeta* (7); *Five Steel Barges* (8); A General Treatise of the Dominion of the Sea and a compleat body of the Sea Laws, 3rd ed. pp. 125, 354;

(1) Lush. 182.
(2) L. R. 3 A. & E. 487.
(3) 1 Ch. Rob. 37, at p. 44.
(4) 1 Hagg. Adm. 383.
(5) W. N. (1891) 52.
(6) L. R. 5 C. P. 428.
(7) L. R. 4 A. & E. 460.
(8) 15 P. D. 142.

1 & 2 Geo. 4, c. 75, ss. 8, 9; Merchant Shipping Act Amendment Act, 1862, s. 49; Merchant Shipping Act, 1894, ss. 544, 546, 547, sub-s. 4, 565, 742; *Bass* v. *Five Negroes and a Canoe* (1); *Jerby* v. 194 *Slaves* (2); *Mason* v. *Ship Blaireau* (3); *The Schooner Emulous* (4); Inquisition at Queenborow (5); Coke's Institutes, IV. cap. xxii.; Pardessus, Collection de Lois Maritimes, vol. i. chap. vi. p. 259, De Lege Rhodia; Sir Sherston Baker's Office of the Vice Admiral of the Coast, p. 12, quotation from Duck de Auctor. juris civil.

Cur. adv. vult.

1895. Dec. 17. LORD ESHER M.R. This was an appeal from a Divisional Court of the Admiralty Division sitting as a Court of Appeal from the county court of Hull having Admiralty jurisdiction. The cause was a salvage cause. The alleged salvage was the saving from danger of a gas float. The nature of the float and the circumstances of the alleged salvage were ascertained by the county court judge. They were that the float "Whitton No. 2" was made of iron; that the lower part bore the resemblance of a ship or boat; that part called by the county court judge the hull had two ends, shaped like the bows of a vessel; it was fifty feet long and twenty feet broad; it had no mast, sternpost, forepost, or rudder; its interior was wholly occupied by a cylinder into which gas was pumped so as to fill it, and so that the gas went up to a light elevated on a pyramid of pieces of wood fifty feet high. The float could not, by reason of its structure, be used for any purpose of its being navigated. It could not be navigated. It could not carry any man or any goods from place to place. It could not hold any man in it except that he could by means of a man-hole and ladder ascend to the light at the top to clean or arrange it. The float was fixed by an anchor or anchors and otherwise at a particular spot in the River Humber, so as to remain always fixed at that spot. It, however, broke away,

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(1) Bee's Am. Rep. 201.

(2) Bee's Am. Rep. 226.

(3) 2 Cranch Am. Rep. 2nd ed. 239, at pp. 265, 266.

(4) 1 Sumner Am. Rep. 207, at p. 210.

(5) Black Book of the Admiralty, edited by Sir Travers Twiss, vol. i. pp. 151, 171.

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The Gas Float Whitton No. 2.

Lord Esher M.R.

and was carried down the Humber, and was in danger in the Humber, and was saved in the Humber by the exertions of the plaintiffs.

The question in dispute was whether the county court had jurisdiction to hear and determine upon the claim of salvage reward.

It was argued on behalf of the appellants before us that the gas float was not the subject-matter of a salvage claim in the High Court of Admiralty within either its common law or any statutable jurisdiction, and that if it was not so, neither was it within the statutable jurisdiction of the county court. It was urged that the original, i.e., the common law, jurisdiction of the Court of Admiralty in respect of salvage was limited to claims in respect of alleged services to a ship and her apparel, or to the cargo of a ship, including cargo which had become flotsam, jetsam, or lagan, and to freight alleged to be saved by the saving of ship or cargo, and to the wreck of ship or cargo, and that the alleged services were rendered on the high sea. It was true that the jurisdiction was extended by statute to the saving of life, but, it was urged, only to the saving of the life of a person whose life was in danger from his being or having been on board a ship, and in danger on the high sea. Where in some cases the jurisdiction of the Admiralty Court was extended further than the limits of the high sea, yet it was so only in respect of the same objects or subjects as were within the jurisdiction of the Admiralty on the high sea. It was then argued that upon the true construction of the statutes giving Admiralty jurisdiction to the county courts they only conferred on those courts, in respect of salvage services occurring within counties, the same jurisdiction as to the same subjects or objects as were within the jurisdiction of the High Court of Admiralty when the services were rendered within its jurisdiction. It was then argued that the float in question was not in any sense a ship, was not a subject or object in respect of the saving of which the High Court of Admiralty could have exercised or could exercise salvage jurisdiction, and therefore was not a subject or object for the similar jurisdiction in the county court.

It was argued for the respondents that the High Court of Admiralty had jurisdiction in respect of salvage services claimed to have been rendered at sea far beyond services to ship, cargo, and apparel and freight; that such jurisdiction extended to the saving of any article in danger on the sea, or if not to all articles, yet to all which could be brought under the denomination of maritime property, and that maritime property included every floating object which is constructed for the purposes of navigation (meaning thereby, having some reference to the business of navigation), although it itself was not intended ever to be and could never be navigated. It was urged that even if such things were not the subject or object of salvage within the original jurisdiction of the Admiralty, they were rendered so by statute; and it was further argued that though not now within the jurisdiction of the High Court of Admiralty, either by common law or statute, they were by statute within the jurisdiction of the county court.

The first point raised is, whence is the original or common law jurisdiction of the High Court of Admiralty of England to be ascertained? The answer is from the continuous practice, and the judgments of the great judges who have presided in the Admiralty Court, and from the judgments of the Courts at Westminster. This proposition was so stated in *The Gaetano and Maria* (1): "It is not the ordinary municipal law of the country, but it is the law which the English Court of Admiralty either by Act of Parliament or by reiterated decisions and traditions and principles has adopted as the English maritime law." Neither the laws of the Rhodians, nor of Oleron, nor of Wisbuy, nor of the Hanse Towns, are of themselves any part of the Admiralty law of England. It was attempted by one of the counsel for the respondents to say that the laws of Oleron were to be considered as part of the law of England. To any one who reads some of their strange enactments—as, for instance, in the Laws of Oleron (2) (art. 23): "If a pilot through ignorance causes the ship to miscarry, he shall make full satisfaction, or lose his head." (Art. 24:) "If the master or one of his mariners or any one of the merchants cut off his head, they shall not be bound to answer for it." (Art. 26:) "If the lord of any place be so barbarous as to maintain [wreckers, &c.] he shall be fastened to a post or stake in the midst of his own mansion-house, which, being fired at the four corners, all shall be burnt together," &c.—it must be ridiculous to suggest that they are part of the English law. But they contain many valuable principles and statements of marine practice which, together with principles found in the Digest and in the French and other ordinances, were used by the judges of the English Court of Admiralty when they were moulding and reducing to form the principles and practice of their Court. All these sources of legal principles were used by Lord Tenterden in his great work; but he says in his preface (1): "It should be observed, however, not only of all these treatises, but also of the Civil law and the Ordinances, without excepting even the Ordinance of Oleron (which, being considered as the edict of an English prince, has been received with peculiar attention in the Court of Admiralty), that they have not the binding force or authority of law in this country, and that they are here quoted, sometimes to illustrate principles generally admitted and received," &c. It should be remarked that as the law of the Admiralty is to be ascertained from the practice and judgments of its judges, it must be found or deduced from affirmative practice or judgments; that neither principle nor proposition can be deduced from mere negative, i.e., by saying the point has never been treated in the Court of Admiralty. If you find that the Court of Admiralty has affirmatively stated that it has jurisdiction in certain cases, you cannot affirm that it has jurisdiction in other cases merely on the ground that the Court of Admiralty has not expressly excluded them by negative words. You must bring the proposed case within some affirmed principle or some affirmative judgment or practice.

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(1) 7 P. D. 137, at p. 143.

(2) See a General Treatise of the Dominion of the Sea and a compleat body of the Sea Laws, 3rd ed. pp. 151, 153.

The second point, therefore, is, what is the jurisdiction of the High Court of Admiralty as to salvage, ascertained from its practice and judgments and from statutes? As to its practice and judgments, irrespective of statutes, it seems to be one uniform continuous statement by judges and writers of authority that the jurisdiction as to salvage is exercised in respect of a ship, her apparel, and her cargo; of freight in danger, and saved by reason of the saving of the ship or cargo; and of flotsam, jetsam, or lagan, being each of them part of the cargo of a ship. Lord Tenterden (1) thus expresses it: It is "the compensation that is to be made to other persons, by whose assistance a ship or its loading may be saved from impending peril, or recovered after actual loss. This compensation is known by the name of salvage." In Park on Insurance, chap. viii., on Salvage (8th ed. vol. i. p. 300), "Salvage is an allowance made for saving a ship or goods, or both, from the dangers of the seas, fire, pirates, or enemies." In Kent's Commentaries (12th ed. vol. iii. p. 245), "Salvage is the compensation allowed to persons by whose assistance a ship or its cargo has been saved in whole or in part from impending danger, or recovered from actual loss, in cases of shipwreck, derelict or recapture. . . . The equitable doctrine of salvage came from the Roman law, and it was adopted by the Admiralty jurisdictions in the different countries of Europe." In Parsons' Law of Shipping, chap. viii., of Salvage (vol. ii. p. 260), "In Admiralty, and generally in the law merchant, it means the compensation which is earned by persons who voluntarily assist in saving a ship or her cargo from peril." In Williams and Bruce's Admiralty, 2nd ed. p. 114, chap. vi., on Salvage, "Salvage is the reward payable for services rendered in saving property lost at sea, or in saving any wreck, or in rescuing a ship or boat, or her cargo, or apparel, or the lives of the persons belonging to her, from loss or danger." In Mr. Carver's book (2) (which will be the Abbott on Shipping of the future), chap. xi., on Salvage and Wreck, s. 322, "By the common law, one who saves, or helps in saving, a vessel to which he is a stranger from danger at sea, is entitled to a reward for his services. . . . So, also, with regard to cargo or other property belonging to a vessel at sea which is rescued from danger, whether while in the vessel

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(1) Abbott's Treatise on Merchant Ships and Seamen, 5th ed. p. xi.

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(1) Abbott's Treatise on Merchant Ships and Seamen, 5th ed. p. 397.

(2) The Carriage of Goods by Sea, 2nd ed. p. 327.

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or after having been thrown or washed out of her; those who rescue such property are entitled to reward, and to a lien upon the property for that reward. The reward thus payable to these salvors is called salvage." There is no word used by any of these writers which mentions any subject or object as the subject or object of salvage under the common law jurisdiction as to salvage of the High Court of Admiralty, other than the ship, her apparel, or cargo, or the wreck of them. If in Williams and Bruce more is meant by the phrase "property lost at sea," the statement is, in the notes, made to depend on the authority of American cases, which will be discussed hereafter. In the last treatise on the subject of salvage—Kennedy on Salvage—the case is thus stated (p. 2): "A salvage service, in the view of the Court of Admiralty, may be described, sufficiently for practical purposes, as a service which saves or helps to save maritime property—a vessel, its apparel, cargo, or wreck—or the lives of persons belonging to any vessel, when in danger," &c. The learned author then quotes the American cases as to rafts of timber, but observes: "There does not appear, however, to be any reported case in which the English Admiralty Court has awarded salvage for the preservation of any but such maritime property as is included in the suggested description." So far, therefore, as the text-writers are to be considered, if the extended meaning of the subject-matter of salvage in the High Court of Admiralty in its original or common law jurisdiction is that which is asserted on behalf of the plaintiffs in this case, all the text-writers but two have overlooked it, and of the two one founds it solely on the American cases, and the other cites those cases but questions them. If we go further, and examine the sources of the English law, as, for instance, the laws of Oleron, Wisbuy, and others, every article in them treats of ships and what concerns them, and of nothing else. For example, art. 43 of the Laws of Oleron, "In all other things found by the sea-side which have formerly been in the possession of some or other, as wines, oil, and other merchandise, although they have been cast overboard, and left by the merchants," &c. So in the most valuable and remarkable code known as the Ordinance of Louis XIV., of August, 1681, the whole of more than 100 sections deals with ships and the affairs of ships only, and with the wreck of ships or effects, called shipwrecked effects. See s. xlv., headed "Wrecks and Ships Run Aground." (1) In the Black Book of the Admiralty there is no passage to indicate anything but ships and the conduct of them. In the Wisby Town-law on Shipping, ch. xiii., headed "Of things found on the sea," (2) runs thus: "Should a man find goods driving on the sea, where he can see no land, should he bring these things to land, he shall have half for his labour; if he could see the land he shall have a third part. Sect. 1: Should a man find goods on the ground where he has to use oars and hooks, he shall have the third part. Sect. 2: Should a man find a ship driving on the sea and no people are in it, and he brings it to land, of that which results from it, whether from the ship or from the goods, he shall have half, and it shall remain outside the City's bounds. Sect. 3: Should a man find goods driving to land to which he can wade, he shall have of them the eighth penny; so likewise should a man find goods driven on to the shore he shall have the eighth penny therefrom. If any one denies that he has found such goods, and is afterwards convicted of it, that is theft." Reading the word "goods" here subject to the context of all the other clauses, it must, I think, mean goods which have been on a ship. The truth is that no merchant or legislator ever imagined goods at sea which had got there without having been in a ship. Then, turning to what is, after all, the chief source from which the jurisdiction of the Admiralty Court is to be ascertained, namely, the decisions of the English Courts, we begin with *Sir Henry Constable's Case* (3), which defines what is "wreck of the sea," and that "flotsam" is when a ship is sunk, or otherwise perished, and the goods float on the sea; "jetsam" is when the ship is in danger of being sunk, and to lighten the ship the goods are cast into the sea, and afterwards notwithstanding the ship perish; "lagan" is when the goods which are so cast into the sea, and afterwards the ship perishes, and such goods cast are so heavy that they sink to the bottom, and the mariners, to the intent to have them again, tie to them a buoy or cork, or such other thing that will not sink, so that they may find them again; . . . and none of these goods which are called jetsam, flotsam, or lagan, are called wreck so long as they remain in or upon the sea; . . . and the Court of Admiralty . . . shall have cognisance and jurisdiction of them whilst they are in or upon the sea." In *Hartfort* v. *Jones* (1), Holt C.J. held in favour of a lien as against an action of trover, the lien being claimed for salvage services; that is, being an Admiralty lien. But those services were alleged to be for saving the goods from a ship which took fire, and that they hazarded their lives to save them. In *Nicholson* v. *Chapman* (2) an action of trover was brought in respect of a quantity of timber placed in a dock on the banks of the Thames, but, the ropes accidentally getting loose, it floated, and was carried by the tide. It was saved, and the defendants refused to deliver it until salvage was paid. Eyre C.J. and the Court held that the saving of it was not such salvage as the law recognises, i.e., in the Admiralty or the Common Law Courts. "The question" is, said the Lord Chief Justice, "whether this transaction could be assimilated to salvage? The taking care of goods left by the tide upon the banks of a navigable river . . . . may in a vulgar sense be said to be salvage; but it has none of the qualities of salvage, in respect of which the laws of all civilised nations, the laws of Oleron, and our own laws in particular, have provided that a recompense is due for the saving; and that our law has also provided that this recompense should be a lien upon the goods which have been saved." He then goes on to say that goods carried by sea are exposed to danger, &c., and that the recompense is dictated by principles of public policy recognised in civilised and commercial countries. He then continues: "Such are the grounds upon which salvage stands; they are recognised by Lord Chief Justice Holt in *Hartfort* v. *Jones*. (1) But see how very unlike this salvage (i.e., in *Hartfort* v. *Jones* (1)) is to the case now under consideration." The difference thus alluded to evidently is that in the earlier case the goods were saved from a ship on the sea; in the later case the goods were never on the sea at all.

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(1) See A Treatise of the Dominion of the Sea and a compleat body of the Sea Laws, 3rd ed. pp. 349 to 356.

(2) Black Book of the Admiralty, edited by Sir Travers Twiss, vol. iv. p. 405.

(3) 5 Rep. 106 a.

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(1) 1 Ld. Raym. 393.

(2) 2 H. Bl. 254.

In the case of a *Raft of Timber* (1) Dr. Lushington refused to issue a monition, i.e., a summons, calling upon the owner of the raft to shew cause why salvage should not be awarded. It is said that the question was only as to the locality in which the services were rendered. But Dr. Lushington also relied upon the nature of the object. "This," he said (2), "is neither a ship or sea-going vessel; it is simply a raft of timber." There is no case in any English Court in which the question of salvage reward has ever been entertained unless the subject of the salvage service was a ship, her apparel, or cargo, or freight, which is peculiar to ships, or wreck of a ship or her cargo, or, by statute, the life of a person in danger, because the person has been on board ship. It follows that no jurisdiction of the Admiralty in England can be carried, by reason of the practice or judgments of the Admiralty or any other Court, beyond a claim for salvage in respect of the subjects and objects above named.

As to the alleged extension of the jurisdiction of the High Court of Admiralty by statute, the question is whether it has been extended by statute in cases of salvage claims to any subjects or objects which were not subjects or objects of salvage claims before the statutes. The first statute really relied on was 3 & 4 Vict. c. 65. It is an Act passed in 1840 to extend the jurisdiction of the Court of Admiralty. It does extend the jurisdiction to subjects in respect of which the Courts had no jurisdiction before. As to salvage, there is only s. 6. This section runs: "The High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to any ship or sea-going vessel, whether such ship or vessel may have been within the body of a county or upon the high seas at the time when the services were rendered." This is to be construed according to ordinary rules of construction. Having regard to the then existing state of the law, it is impossible to say that the statute goes further than to extend the area of locality. It

(1) 2 Wm. Rob. 251.

(2) 2 Wm. Rob. at p. 255.

abolishes the distinction between the same services in respect of the same subjects or objects, according as they were rendered within the body of a county or on the high seas, but does not alter the nature of salvage, which is a reward for services to ship, &c.

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The statute 17 & 18 Vict. c. 78, s. 13, was relied on. The words are: "In all cases in which a party has a cause or right of action in the High Court of Admiralty of England against any ship or freight, goods, or *other effects whatever*, it shall not be necessary to the institution of the suit for such person to sue out a warrant for the arrest thereof, but it shall be competent to him to proceed by way of monition." The whole statute is as to the regulation in the Admiralty Court of the procedure in cases in the court. The statute is not applicable until the case is in the court. It does not affect the question of what case is or is not within the jurisdiction of the court—that is, what case is or is not capable of being brought into the court. The statute 9 & 10 Vict. c. 99, was called to our attention, and was minutely dissected. It is repealed (1), but nevertheless it was said it could be used to shew what were the subjects or objects of salvage. I think that after its repeal it cannot be used at all; but if it could, it does not seem, upon a true construction of it, to support the assertions for which it was cited. The section mainly relied upon was s. 40: "The High Court of Admiralty shall have jurisdiction to decide . . . . upon all claims and demands whatsoever in the nature of salvage for services performed, except in cases of goods hereinbefore directed to be sold as droits of Admiralty, whether in the case of ships or vessels, or of any goods or articles found either at sea or cast upon the shore, and whether such services shall have been performed upon the high seas or within the body of any county, anything in any Act contained to the contrary notwithstanding." But that section ascertains only the forum of trial. Sect. 19 enacts what can be saved, so as to give a right to salvage, and the persons entitled to salvage reward for such saving: "Every person (except receivers under this Act) who shall act or be employed

(1) 17 & 18 Vict. c. 120, Sched.

in any way whatsoever in the saving or preserving of any ship or vessel in distress, or of any part of the cargo thereof, or of the life of any person on board the same, or of any wreck of the sea, or of any goods, jetsam, flotsam, lagan or derelict, or of any anchors, cables, tackle, stores, or materials which may have belonged to any ship or vessel, whether the said ship or vessel shall have been in distress or otherwise . . . . shall be paid a reasonable reward or compensation by way of salvage," &c. It seems that, construing these two sections as parts of one statute, s. 40 determines the forum to which the claims of persons who claim to have performed the services to the subjects or objects named in s. 19 is to be referred.

We are then brought to the main statute applicable to the case before us, the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104). It was passed to amend and consolidate the Acts relating to merchant shipping; not specifically to alter anything with regard to salvage. It does not in its title or preamble state an intention to alter the *common law* applicable to merchant shipping, but only *the Acts* relating to merchant shipping. The first section relied on is s. 2, the interpretation section. Such a section in modern drafting of statutes does not of itself affect the nature of anything spoken of or dealt with in the statute. It only avers that, instead of repeating every one of several things dealt with in other sections, they are to be taken as repeated whenever the one word or phrase is used. Thus, wherever the word "ship" is used in any section of the Act, it is as if in that section the words were "a ship and every description of vessel used in navigation, not propelled by oars." The statute deals with a variety of matters relating to merchant shipping, and with a great number of modes of dealing with such matters within and without different courts. One part of the statute deals with salvage. The sections relating to it are under the heading "Salvage in the United Kingdom." It deals, therefore, only with salvage on the high seas within the three mile limit, and with salvage within counties. Sect. 458 is: "Whenever any 'ship'—i.e., when any ship or any description of vessel used in navigation, not propelled by oars—or boat, is stranded or otherwise in

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distress on the shore of any sea or tidal water situate within the limits of the United Kingdom—i.e., Great Britain and Ireland—and services are rendered (1.) in assisting such ship—i.e., ship or any description of vessel, &c.—or boat; (2.) in saving the lives of the persons belonging to such ship—i.e., ship or, &c.—or boat; (3.) in saving the cargo or apparel of such ship—i.e., ship or, &c.—or boat, and whenever any wreck—i.e., wreck or jetsam, flotsam, lagan, and derelict found in or on the shores of the sea or any tidal water—is saved by any person other than a receiver within the United Kingdom, there shall be payable, &c., a reasonable amount of salvage." Sect. 459 is: "Salvage in respect of the preservation of the life or lives of any person or persons belonging to any such ship—i.e., ship or, &c.—or boat, as aforesaid." The section does not deal with salvage beyond the three mile limit. It is obvious that within the limit it specifically deals with subjects or objects which, as has been stated at the commencement of this judgment, were the subjects and objects alone dealt with in the High Court of Admiralty before any statutes as regards salvage. This section does not add, either within or without the realm, to the subjects or objects of salvage. Sect. 476 runs: "Subject to the provisions of this Act, the High Court of Admiralty shall have jurisdiction to decide upon all claims whatsoever relating to salvage, whether the services in respect of which salvage is claimed were performed upon the high seas or within the body of any county," &c. In this section the subjects or objects of salvage are not mentioned. It deals with salvage. With what salvage? Obviously with that which is in law salvage, i.e., with the saving of the subjects and objects which in law—i.e., the common law, the statute law, and the maritime law—are recognised as the subjects and objects of salvage reward. Sect. 497 is no larger. The statutes do not enlarge the subjects or objects, but by dealing only with the subjects and objects mentioned strongly corroborate the view herein expressed as to the original jurisdiction of the High Court of Admiralty. Part VI. is headed "Lighthouses" and "Management of Lighthouses." By the interpretation clause, in addition to the ordinary meaning of the word, lighthouse "shall include floating and other lights exhibited for the guidance of ships, and 'buoys and beacons' shall include all other marks and signs of the sea." They are in this Act, all of them, distinguished from ships. The statutes have added one subject—namely, life—as liable to salvage, to be awarded by the High Court of Admiralty, but have added no other.

The question argued, that a larger jurisdiction as to the subjects or objects of salvage is given to the county courts than to the High Court of Admiralty, is too preposterous to be worthy of further notice.

It was argued that the gas float was a ship within the ordinary meaning of the word ship, or within the meaning of what was said to be the definition of the word ship in some judgments of the Court. It is said that the judgment of Lord Blackburn in *Ex parte Ferguson* (1) is inconsistent with the view that "ship" is to be used only in its ordinary meaning amongst people conversant with shipping business. But the description given of that which in the case was called a "coble" made it clear that that coble was a vessel in its ordinary sense, though all cobles are not ships or vessels, but some are only boats. The case of *The Mac* (2) was much relied upon. It is the case of a hopper-barge. I agree that expressions used by me were not happy. I think the first phraseology is well enough: "The word includes anything floating in or upon the water, built *in a particular form, and used for a particular purpose*." (3) But I think the subsequent phrase, "She is used in navigation . . . . for the purposes of navigation," was unhappy. It should have been "She was being navigated." In the case of *The Cleopatra* (4) the thing saved was held to be sufficiently like a ship to be not unfairly treated as a ship. The case of *The Owners of a Caisson* (5), before Sir Robert Phillimore, is relied on. It looks as if the judge of the Admiralty Court was asked by both sides to name the amount, and the distribution of a fair reward. If so, he

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(1) L. R. 6 Q. B. 280.

(2) 7 P. D. 126.

(3) 7 P. D. at p. 130.

(4) 3 P. D. 145.

(5) Pritchard's Maritime Digest, 3rd ed. vol. ii. p. 2078, No. 1139; *Shipping Gazette*, May 10, 1876.

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acted as an arbitrator. If he acted as judge, the case is contrary to all others, and is wrong.

It seems impossible to say that within the ordinary English meaning among merchants or sailors or persons dealing with maritime affairs this thing could be called a ship, a vessel, or a boat. But now we have to deal with the argument that the general law maritime acknowledged in the High Court of Admiralty included, and includes, subjects or objects as the subjects or objects of salvage which are beyond ship, apparel, and cargo, including flotsam, jetsam, and lagan, and wreck of ship or cargo. It was argued that everything found floating on the water, although it itself could not possibly be a navigable thing, might be the subject or object of salvage; and it was said that there are American judgments which justify such a statement. If there are, I for one should hesitate long before I differed from them. I have the greatest respect and admiration for American decisions. It is because of the reference to the American judgments that I have used immense labour in writing this judgment. I hope it will be some day considered in American Courts. But before examining the American judgments, I will refer to the statement of the law by Bowen L.J. in *Falcke* v. *Scottish Imperial Insurance Company* (1): "The general principle is, beyond all question, that work and labour done or money expended, by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will. There is an exception to this proposition in the maritime law. . . . With regard to salvage, . . . the maritime law differs from the common law. That has been so from the time of the Roman law downwards. The maritime law for the purposes of public policy, and for the advantage of trade, imposes in these cases a liability upon the thing saved, a liability which is a special consequence arising out of the character of mercantile enterprises, the nature of sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances. No similar doctrine applies to things lost upon land, *nor to anything except ships or goods* in peril at sea." The judgment of Martin B. in *Palmer* v. *Rouse* (1) seems to be to the same effect: "The case depends on the construction of the Merchant Shipping Act, 1854. That Act was passed with reference to shipping, and must therefore be taken to apply to matters connected with shipping. The Act gives a jurisdiction unknown at common law, and subjects the owners of goods to the payment of charges to which at common law they were not liable. It must therefore be construed strictly. Now according to the well-known meaning of flotsam. . . . it refers to goods having been at sea in a ship and separated from it by some peril."

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(1) 34 Ch. D. 234, at p. 248.

The case principally relied on in the American reports is that called *A Raft of Spars*. (2) It was a libel in rem, filed in April, 1848, in a district court having Admiralty jurisdiction, to recover compensation for salvage services. The raft, which consisted of sixteen spars, was observed to be adrift below the Narrows, and floating out to sea. The libellant stopped the raft, and towed it to the Staten Island shore. The owner of the raft instituted a replevin action in the Supreme Court of the State of New York and intervened in the Admiralty suit, and moved that the action there should be set aside, or that all proceedings in it should be stayed until the replevin suit in the State Court should be determined. On this motion Betts J. said: "The single point which arises for decision upon the motion is whether this Court will, either as matter of right to the claimant, or by comity towards the municipal courts, cause the prosecution of this action to surcease until the action at law in the State Court is determined." The point that an Admiralty Court had no jurisdiction to entertain the question of salvage does not seem to have been argued at that stage. The judgment seems to be that, assuming for the purposes of the motion before it, both Courts had jurisdiction, there was no legal reason for postponing the hearing of the one suit to the hearing of the other. What might be decided in either Court on the hearing was left for the future. The cause came on for hearing in February, 1849, when Betts J. overruled the objection to the jurisdiction, entertained the case in Admiralty, and decreed salvage. (1) The next case in order of date is *Tome* v. *Four Cribs of Lumber*. (2) It was heard in November, 1853, in the Circuit Court on appeal from the district court in Admiralty. Rafts, or a raft of timber, were being floated down the Susquehanna River. The raft was anchored in the stream. By reason of a sudden rise in the river, accompanied by a high wind and heavy sea, the rafts went adrift and were carried down the river with the current. They were stopped by one Davis, who claimed salvage. The district court entertained and allowed salvage reward. In the Circuit Court the judgment was reversed by Taney C.J., on the ground that the district court had no jurisdiction. The Chief Justice relied much on the case of *Nicholson* v. *Chapman*. (3) He says (4): "These rafts, anchored in the stream, although it be a public navigable river, are not the subject-matter of Admiralty jurisdiction, in cases where the right of property or possession is alone concerned. They are not vehicles intended for the navigation of the sea, or the arms of the sea; they are not recognised as instruments of commerce or navigation by any Act of Congress. They are piles of lumber, and nothing more, fastened together and placed upon the water until suitable vehicles are ready to receive them and transport them to their destined port, and any assistance rendered to these rafts, even when in danger of being broken up, or swept down the river, is not a salvage service in the sense in which that word is used in the Courts of Admiralty. . . . The district court therefore had not jurisdiction to issue the process," &c. This judgment seems to me to adopt the reason of the judgment in *Nicholson* v. *Chapman* (3), contained in the words: "The service had none of the qualities or character of the services for which the maritime law of all commercial nations allowed salvage when the property was in danger of perishing from the perils of the sea." There are parts of the judgment of the Chief Justice which seem to shew that he thought the raft in question was not in danger. But that is not a point of jurisdiction; it is a point which would be an answer to the claim at the trial, and which would have to be tried by the Court if it assumed, or could assume, jurisdiction.

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(1) 3 H. & N. 505, at p. 509.

(2) 1 Abbott Adm. 291.

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(1) 1 Abbott Adm. 485.

(2) Taney's Judgments, 533.

(3) 2 H. Bl. 254.

(4) Taney's Judgments, 533, at p. 547.

The case 50,000 *Feet of Timber* (1), in 1871, in the district court, is with respect to two rafts of timber found floating in the harbour of Boston. Lowell J. decreed a salvage reward. He said: "A salvage service is performed when goods are saved from peril at sea, or on other navigable waters, or cast upon the shores thereof. . . . There are two judgments that a raft of timber is an exception to the general rule: *Nicholson* v. *Chapman* (2); *Four Cribs of Lumber*." (3) This seems to be hardly an accurate description. The cases did not state that there was an exception; they stated a rule, and decided that rafts of timber were not within it. The judgment, with deference, is more sarcastic than well considered. The learned judge asserts that Taney C.J. was mistaken and Dr. Lushington wrong. He construes the English statute 9 & 10 Vict. c. 99, s. 40, with deference again, I say, wrongly. He says that the only difficulty in the case before Dr. Lushington was as to locality, and he says that "it was so held by Judge Betts in a well-considered judgment." He continues (4): "A suit for salvage is neither contract nor tort. It resembles the latter in being a proceeding for unliquidated damages, and in depending on locality." Is that a correct description either of a salvage suit, or even of the action to which the learned judge assimilates such suit? "If the services are rendered, it is of no consequence whether the goods are a ship or part of a ship, or were ever on board a ship. A great many of the cases are of mere derelict goods picked up at sea; and no one ever heard that it would be a defence to a proceeding for salvage, that the goods had been washed out to sea from the shore by a gale or a flood, or had been dropped from a balloon. I have had a case of the former kind; though, to be sure, the subject-matter was an unmanned vessel. If it had been a barrel of oil, the principle would have been the same." I cannot accept this judgment as a careful discussion and decision on American law. *Bywater* v. *A Raft of Piles* (1), in June, 1890, is decided on the authority of the cases before Betts J. and Lowell J., and on an endeavour to distinguish the case before Taney C.J.

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(1) 2 Lowell's Judgments, Dist. Ct. Massachusetts, 64.

(2) 2 H. Bl. 254.

(3) Taney's Judgments, 533.

(4) 2 Lowell's Judgments, 64, at p. 65.

Whilst writing this judgment, and, indeed, at a very late period of it, the counsel on both sides, with the loyalty always shewn by counsel to the Court, sent to me the case of *Cope* v. *Vallette Dry Dock Company* (2), decided in January, 1887, in the Supreme Court of the United States. It was an appeal from the Circuit Court of Louisiana, which had dismissed a libel for salvage brought in the district court, on the ground that the district court sitting in Admiralty had no jurisdiction to entertain in the particular case a claim for salvage. The salvage claimed was in respect of saving from total loss a dry dock. It was a structure contrived for the purpose of taking ships out of the water in order to repair them, and for no other purpose. It consisted of a large oblong box, with a flat bottom and perpendicular sides; in the year 1866 it had been put in position by being permanently moored by means of large chains to the bank of the Mississippi River, and was sparred off from the bank by means of spars to keep it afloat. When it was desired to dock a vessel the dry dock was sunk by letting in water until the vessel to be docked could be floated into it. It was then raised by pumping the water out, leaving the docked vessel in a position to be inspected and repaired. It was furnished with engines, but they could only be used for pumping, and the dry dock had no means of propulsion, either by wind, steam, or otherwise. It was not designed for navigation, and could not be practically used therefor. As a conclusion of law the Circuit Court found that the services of the libellants were not salvage services, and that neither that Court nor the district court had jurisdiction of the case. Bradley J., delivering the judgment of the Supreme Court, said: "We have no hesitation in saying that the decree of the Circuit Court was right. A fixed structure, such as this dry dock is, not used for the

(1) D. C. D. Wash. 42 Fed. Rep. 917.

(2) 119 Sup. Ct. U.S. 625.

purpose of navigation, is not a subject of salvage service any more than is a wharf or a warehouse when projecting into or upon the water . . . A ship or vessel, used for navigation and commerce, though lying at a wharf, and temporarily made fast thereto, as well as her furniture and cargo, are maritime subjects, and are capable of receiving salvage service." The judgment then cites the passage from Abbott, and cites other English authorities, and then says: "If we search through all the books, from the Rules of Oleron to the present time, we shall find that salvage is only spoken of in relation to ships and vessels and their cargoes, or those things which have been committed to, or lost in, the sea or its branches, or other public navigable waters, and have been found and rescued." The judgment then discusses the case of the hopper barge (1), and then, referring to the American cases, says: "There has been some conflict of decision with respect to claims for salvage services in rescuing goods lost at sea and found floating on the surface or cast upon the shore. When they have belonged to a ship or vessel as part of its furniture or cargo, they clearly come under the head of wreck, flotsam, jetsam, lagan, or derelict, and salvage may be claimed upon them. But when they have no connection with a ship or vessel some authorities are against the claim, and others are in favour of it." The only authorities in America for the use of the large terms insisted upon by the arguments before us are the cases before Betts J. and Lowell J. I think that those cases cannot be supported in America, or acted on here. As to American law, I think the case in the Supreme Court is decisive.

I come, therefore, to the conclusion that by the common or original law of the High Court of Admiralty the only subjects in respect of the saving of which salvage reward could be entertained in the Admiralty Court were ship, her apparel and cargo, including flotsam, jetsam, and lagan, and the wreck of these and freight; that the only subject added by statute is life salvage; and that the county court has no right to exercise jurisdiction with regard to any other subject-matter than that which might be entertained by the High Court of Admiralty.

(1) *The Mac*, 7 P. D. 126.

C. A.
1895

THE GAS FLOAT WHITTON No. 2.

Lord Esher M.R.

Whether salvage could be granted for the saving of what is called a lightship may be doubtful. I incline to think not; if it could be, it is only because the lightship would be held to be a ship. As to some instances which were proposed—such as the *Victory* in Portsmouth Harbour—I have no doubt that she is a ship. So was the *Dreadnought*, used for years as a hospital. So is a ship used as a coal hulk. But the thing in question on this appeal is not a ship in any sense.

KAY L.J. I have had an opportunity of reading the judgment of the Master of the Rolls, and I agree with it.

LORD ESHER M.R. I am authorized to say that LOPES L.J. agrees with the conclusion I have arrived at, and with the reasons for the judgment.

Appeal allowed.

Solicitors for appellants (defendants): *Rowcliffes, Rawle & Co., for Wilson & Sons, Hull.*

Solicitors for respondents (plaintiffs): *Pritchard & Sons, for Hearfields & Lambert, Hull.*

T. L. M.

1895 Nov. 25; Dec. 9.

1896 Jan. 16.

IN THE GOODS OF THE RIGHT HONOURABLE SIR CHARLES AUGUSTUS MURRAY, K.C.B.

Probate—Practice—Two Wills, one dealing with English, the other with Foreign Property—Independent English and Foreign Wills—Incorporation of Foreign with English Will.

A testator made two wills with codicils, the earlier relating to property in the United States, the later to property in England, and appointed executors in the two countries, his intention being that the American executors, after realizing so much of his property in America as they required for the purpose of paying his debts there and the legacies given by his American will and codicils, should realize the residue under the direction of his English representatives and hand the proceeds over to them, to be dealt with as directed by the English will and codicils:—

Held, that the American and English wills were independent documents, and the English will did not incorporate the American will, and that, therefore, the American will and codicils ought not to be included in the probate to be granted of the English will and codicils.

THE Right Honourable Sir Charles Augustus Murray, K.C.B., lately Envoy Extraordinary and Minister Plenipotentiary to the King of Portugal, died in Paris on June 3, 1895, leaving a will dated August 10, 1870, and codicils, relating to property in the United States of America, and a will dated November 2, 1885, and codicils, relating to property in England.

Motion on behalf of Charles James Murray, Herbert Henry Walford, and Reginald John Smith, the executors of the will of November 2, 1885, with codicils, and George Coppel, executor of the will of August 10, 1870, with codicils, that the said wills and the codicils thereto should be admitted to probate, as containing the last will and testament of the deceased.

It was stated on affidavit that "the said George Coppel, the American executor, originally intended to present the American will and codicils to the surrogate of New York for probate there; but, under the laws of the United States (1), the testimony of the surviving witnesses of the will and codicils, and evidence of the death and handwriting of any who might not be living, are required. But, as the attempts to trace the various witnesses have been unsuccessful in several cases, the said George Coppel is now desirous that the American will and codicils should be admitted to probate in England with the English will and codicils, as being part of the same."

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(1) Meaning, presumably, the State of New York.—F. P.

Bayford, Q.C. (*Bargrave Deane* with him), for the applicants. The American will and codicils should be included in the probate. The passage in the affidavit shews the difficulty which has arisen. The American will does not dispose of the American estate, but merely directs that the proceeds shall be remitted to England. It would seem, therefore, that the testator intended the American will to be part of the English will. If the American will is included in the English probate, ancillary letters will probably be granted in America. It is contended that the American will should be considered as speaking, not from its own date, but from that of the death of the testator, and that, if so, it incorporates the English will, the provisions of which it expressly confirms; and that *In the Goods of Lord Howden* (1) and *In the Goods of Bolton* (2) are authorities in the applicants' favour.

Cur. adv. vult.

Jan. 16. GORELL BARNES J. In this case Mr. Bayford moved for an order that a certain will of the deceased and codicils thereto, dealing exclusively with his property in America, should be included in the probate which was about to be obtained of what I may term his English will and codicils thereto. The original American will and codicils are in America, but the case was for convenience argued on what I understand are copies thereof.

From the copies of these documents it appears that on August 10, 1870, the testator, then at Lisbon, executed a will by which he gave all his estate real and personal within the United States of America to his executors thereinafter named upon trust to realize his said real and personal estate and apply the proceeds, after payment of his debts in the said United States, and a small bequest to his executors, in the following manner: To remit the residue of the said proceeds to his bankers in London, with instructions to have it placed to the credit of his wife and two other persons, or the executors of any will he might make according to the laws of England, or to any administrator of his effects in that country, should he fail to name any executor or executors, or naming such and he or they declining to act, and he appointed certain persons of Boston and New York executors of his said will. And he expressly declared that his said will referred only to the estate real or personal of which he might be possessed at the time of his decease within the United States of America, and should not in any manner invalidate or interfere with any testamentary disposition theretofore or thereafter made by him of property belonging to him in England or elsewhere, not being in the United States of America. And he thereby confirmed every such testamentary disposition as fully as if the same were therein repeated, and he revoked all other and former wills made by him respecting any property real or personal belonging to him in the United States of America.

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(1) 43 L. J. (P. & M.) 26.

(2) 12 P. D. 202.

The testator made four codicils to this will, all of which, I gather, were made before the English will. In one of these, dated June 21, 1871, he declared that his said will and codicils were to apply only to his estate real or personal in the United States, and should not apply to any estate which he might have in England or elsewhere. In another of the said codicils, dated October 2, 1874, he directed his executors to sell and convert into money, under the powers of the said will, only so much of his real and personal estate within the United States of America as might be required to pay the debts and legacies mentioned in his said will and codicils, and from time to time, as and when they should be so directed by the executors of any will he might make according to the laws of England, to realize his said real and personal estate which should not have been realized for the purposes aforesaid, and remit the proceeds to his bankers in London with directions to them to have the same placed to the account and credit with them of Henry, Earl of Ducie, Charles Adolphus, Earl of Dunmore, and Herbert Henry Walford, or the successors or successor of them or of

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IN THE GOODS OF MURRAY.

Gorell Barnes J.

other the executors or executor for the time being of any will he might make according to the laws of England, or should there be no executors or executor, then of any administrator for the time being of his effects in that country, and from time to time, as and when the rents interest dividends and annual income should become due and payable, to be received on such part or parts of his said real and personal estate as should not for the time being have been so realized, to remit the same to his said bankers with directions to them to have the same placed to the account and credit with them of the persons or person thereinbefore mentioned. The codicils also made certain changes in the executors, but all those named were Americans.

On November 2, 1885, the testator made a will in England in which, after certain bequests and devises, he recited the said codicil of October 2, 1874, to his American will, and then directed the executors of that (the English) will to stand possessed of the monies so to be remitted by his executors in the United States of America as the proceeds of his real and personal estate in that country upon the trusts thereinafter declared concerning the capital of the residue of his real and personal estate in Great Britain, and he directed his executors of that (the English) will to stand possessed of the monies so to be remitted by his executors in the United States of America as rents interest dividends and annual income of his real and personal estate in that country upon the trusts thereinafter declared concerning the annual income arising from the investment of the residue of his real and personal estate in Great Britain, and he thereby gave the executors of that his (English) will full and uncontrolled power to give directions to his executors in the United States of America, to sell and dispose of his real and personal property in the United States of America, or any part or parts thereof, at such time or times and from time to time as they in their sole discretion might think fit, and to defer such directions until such time or times as they in their sole discretion might think fit. And he directed that the executors of that his (English) will should not be answerable or accountable to any person or persons whomsoever, or to any Court of law or equity whatever, for any loss injury or prejudice which might be sustained, arise or happen by or to his real and personal estate in the United States of America or any part or parts thereof, either from giving or deferring to give such directions as aforesaid, or for any deficiency in price on the sale of the same or any part or parts thereof, or for any banker or other person in that country with whom or into whose hands the said property or the proceeds thereof (whether capital or income) or the securities for the same might be deposited or come, or for the insufficiency or deficiency of any bills drawn or negotiated by way of remittance, or for any omission to give notice of dishonour or other defect of management whatever, but that his executors in the United States of America should be solely responsible for his estate in that country and for the monies arising therefrom, to the entire exoneration of the executors of that his (English) will, until the same *monies* should be remitted, and the bills of remittance duly honoured, and the monies thereby payable be actually received by Messrs. Drummond (the bankers), and placed by them to the account and credit with them of the executors of that (his English) will.. And as to all other his property both real and personal of what nature or kind soever, after discharging all costs and expenses incurred in converting the same into money, he directed his executors to stand possessed of the same upon certain trusts therein declared. And he appointed his son Charles James Murray, Herbert Henry Walford, and Reginald John Smith the executors and trustees of that his (English) will, and he declared that any wills or will made or to be made by him according to the form prescribed by the laws of the United States of America, and which might exclusively apply to any property within that country, should not affect or in any manner interfere with the dispositions and bequests thereby (that is, by the English will) made.

To this will there were several codicils, but they do not contain anything which affects the question before me.

I think it is clear from the documents, the material portions of which I have referred to, that the testator intended the two sets of documents to be kept entirely distinct. He appointed executors to act in America under his American will and codicils, and executors in this country to act under the English will and codicils; and his intention was that the American executors should, after realizing so much of his property in America as they required for the purpose of paying his debts and the legacies given by his American will and codicils, realize the residue under the directions of his English representatives and hand the proceeds thereof over to the latter in this country, to be dealt with by them when received as directed by the English will and codicils. It is equally clear that, apart from any technical question, the reasonable and simple course to adopt in this case is to prove the English will and codicils in this country, and the American will and codicils in the United States. For, even if all the documents were included in the probate granted by this Court, it would still be necessary, for the purpose of dealing with the American assets, to obtain a further grant of probate from the proper Court in the United States; which would, however, as the deceased was, if I correctly understand, a domiciled Englishman, probably follow the decision of this Court, and grant probate ancillary to that granted in this country as being the country of the testator's domicil.

But it was stated to me that there are formalities to be complied with in order to prove the American will and codicils in the United States of America, and that, although they can be complied with, there is some difficulty in doing so, and that it would be more convenient to allow both sets of documents to be included in the probate in this country, so that the executors might be able to obtain from the proper Court in America a grant of probate ancillary to that granted by this Court. It was also urged that both sets of documents together form the last will of the deceased, and should therefore all be included in the probate.

The question for my decision does not, in my opinion, depend on matters of convenience, but upon whether or not the Court ought to include the American will and codicils in the probate.

If the testator had made an English will only, which disposed of all his real and personal estate, the grant of probate by this Court would not extend to the testator's assets in a foreign country, for, as is pointed out at p. 300 of Williams on Executors, vol. i. 9th ed., "the probate was never granted except for goods which at the time of the death were within the jurisdiction of the ordinary who made the grant; though, if it should becomes necessary that the courts of the foreign country where the assets were situate should grant probate or administration for the purpose of giving a legal right to recover and deal with them, such court, by the comity of nations, would probably follow the decision of the Court of Probate in this country, as being the country of domicil": see also per Lord Brougham in *Attorney-General* v. *Hope* (1)—after inquiry made by him of the judge of the Prerogative Court and the King's Advocate. In the same way, if the deceased had died intestate, the grant of administration obtained here would not extend to his assets abroad, though the foreign courts would probably follow the English grant. Again, if he had died leaving a will not appointing any executors to act in this country, and disposing only of property in a foreign country, that will would not have been entitled to probate in this country: see *In the Goods of Coode* (2) and *In the Goods of Mary E. Mann* (3); for "the object of this Court in making grants is to enable the executors or administrators to administer property in this country" (4): see also *In the Goods of Tucker.* (5)

It follows, in my opinion, that if two independent wills are made, one disposing of the testator's property in this country and the other disposing of his property abroad, the former alone should be admitted to probate in this Court. If, however, the two wills are not independent the case is different. The English will, if last, may incorporate the foreign will (as in the cases of *In the Goods of Lord Howden* (6) and *In the Goods of Harris* (7)), and then the probate should include both documents, as they virtually become one document. So also the foreign will, if last, may incorporate the English will, in which case the foreign will would not be limited in its operation to property abroad, and both would be included in the probate.

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(1) 2 Cl. & F. 84, at pp. 91-92.

(2) L. R. 1 P. & D. 449.

(3) [1891] P. 293.

(4) Per Sir J. P. Wilde in *In the Goods of Coode*, L. R. 1 P. & D. 449

(5) 34 L. J. (P. M. & A.) 29.

(6) 43 L. J. (P. & M.) 26.

(7) L. R. 2 P. & D. 83.

In the present case the two wills, with their respective codicils, are independent documents and were intended by the deceased to be so. The English will, although it mentions the American will and the codicil of 1874, does not, in my opinion, incorporate the American will or its codicils, and was not intended to do so. Applying the foregoing observations, it follows, in my judgment, that the American will and codicils, disposing as they do of property in the United States of America only and appointing separate executors thereof, ought not to be included in the probate to be granted by this Court of the English will and codicils.

It was also argued that the American will did, in fact, incorporate the English will, because the former contained the clause that it was not in any manner to invalidate or interfere with any testamentary disposition theretofore or thereafter made by the testator of property belonging to him in England or elsewhere not being in the United States of America, and confirming every such testamentary disposition as fully as if the same were repeated in the American will, and because the American will, though earlier in date than the English will, should be taken as speaking from the death of the testator. I am, however, of opinion that the American will does not incorporate the English will, and that the clause just referred to could not confirm a will not then in existence. The statute does not enact absolutely that a will shall speak as if it had been made just before the death of the testator, but only that it shall do so in respect of the property comprised in it. (1) I was also referred to the Finance Act, 1894; but I am of opinion that that Act does not affect the question which I am called upon to decide—namely, what documents ought to be admitted to probate.

There have been a number of cases on this question of English and foreign wills, and they do not all seem to be consistent; but my judgment follows the principles indicated in those cases in which the matter appears to me to have been most fully considered: see especially *In the Goods of Lord Howden*. (1) I therefore order that the American will and codicils be not included in the probate, and, according to the practice, copies of the American will and codicils must be filed in the registry, together with an affidavit verifying them; and a note must be appended to the probate that such affidavit has been filed.

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(1) By the Wills Act, 1837 (7 Wm. 4 and 1 Vict. c. 26), s. 24, "Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

Solicitors: *Walfords*.

H. D. W.

BARBER *v.* BARBER.

1896
Jan. 13.

Divorce—Dissolution of Marriage—Practice—Co-Respondent—Leave to proceed without making a co-Respondent—Necessity for Corroboration of Affidavit of Petitioner — Matrimonial Causes Act, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 28 (2)—*Rules of* 1865, *rr.* 4, 5.

Where, upon a motion for leave to proceed without making a co-respondent, it appeared that the affidavit of the petitioner was not corroborated, the Court ordered an adjournment in order that an affidavit in corroboration might be filed, and stated that, in future, if the affidavit of the petitioner were not corroborated, any such motion would probably be dismissed.

MOTION for leave to proceed without making a co-respondent. The petition charged the respondent with adultery with two men whose names were unknown. The affidavit of the petitioner was not corroborated.

A. E. Lyons, for the petitioner.

GORELL BARNES J. The practice of the Court requires that the affidavit of the petitioner be corroborated by that of some

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(1) 43 L. J. (P. & M.) 26.

(2) By s. 28 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), "Upon any such petition (i.e. for dissolution of marriage) presented by a husband, the petitioner shall make the alleged adulterer a co-respondent to the said petition, unless on special grounds, to be allowed by the Court, he shall be excused from so doing."

By Rules of 1865, r. 4, "Upon a husband filing a petition for dissolution of marriage on the ground of adultery, the alleged adulterers shall be made co-respondents in the cause, unless the Judge Ordinary shall otherwise direct."

By r. 5: "Application for such direction is to be made to the Judge Ordinary, on motion founded on affidavit."

See *Leader* v. *Leader*, decided by Sir C. Cresswell in 1863, 32 L. J. (P. M. & A.) 136.

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v.
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other person. The motion is adjourned for a week in order that an affidavit in corroboration may be filed; and I give notice that, in future, if the affidavit of the petitioner be not corroborated, any such motion will probably be dismissed.

Solicitor: *Downes.*

H. D. W.

1895
Dec. 19.

FRITH *v.* FRITH AND PAICE.

Divorce—Practice—Evidence—Identification—Use of Photographs.

In matrimonial cases, except under very special circumstances, the Court will not act upon identification by a photograph only.

UNDEFENDED divorce case tried before Gorell Barnes J.

G. Elliott, for the petitioner.

The proceedings in regard to identification were as follows:—

The petitioner. I am an engine-driver. Paice was a lodger in my house. I saw him come out of our bedroom several times, and saw my wife out late at night with him. I told him to leave the house. She said that, if Paice left, she would go too. This was after I had had a fight with Paice about her. Paice went to Guildford, and she went with him. Afterwards she promised to behave better, and I said I would give her another trial. While I was at work, she sold the furniture, and took the money. I afterwards found that she was living at Guildford, and commenced these proceedings.

[A small photograph was handed to the witness.]

That is my wife's photograph.

Samuel and *Sarah Heathorn* deposed that a man and a woman had lived in their house at Guildford as Mr. and Mrs. Paice, and, the photograph being handed to them, said that this was the woman who had lived in their house as Mrs. Paice.

The petitioner's solicitor proved the service of the citation on the respondent, while living under the name of Mrs. Paice, and on the co-respondent.

The Judge. I cannot act upon a photograph alone, and this is a very small one. I am continually asked to do this; but it should be known that it is not the practice of the Court, except under very special circumstances, to act upon a photograph alone. It is high time that this should be understood.

G. Elliott. There was difficulty as to identification.

The Judge. I can see no difficulty. Why could not the petitioner have been taken to Guildford? The Guildford witnesses could then have pointed out the woman who passed as Mrs. Paice, and the petitioner could have said that that woman was his wife. The case is adjourned till to-morrow.

Dec. 20. Mrs. Heathorn deposed that she had pointed out to the solicitor the woman who had lived with her as Mrs. Paice: the solicitor, that the woman pointed out was the woman seen by him and that the petitioner was present when she was pointed out: the petitioner, that he was present when the woman was pointed out, and that she was his wife.

GORELL BARNES J. granted a decree nisi with costs against the co-respondent.

Solicitor: *Nicholson.*

H. D. W.

LANCASTER *v.* LANCASTER.

1895
Dec. 3, 17.

Divorce—Judicial Separation—Practice—Agreement for Settlement of Action—Separation Deed—Costs of preparation of Separation Deed.

The parties to a suit for judicial separation made an agreement for the settlement of it, providing for the execution of a separation deed; that the respondent should pay the costs of the petitioner's suit; and that the agreement might be made a rule of Court:—

Held, that as the agreement was enforceable by specific performance or in any Division of the High Court of which it might be made a rule, the carrying out of it was not a step in the suit, and the Court had, therefore, no jurisdiction over the costs of the deed.

OBJECTION by the petitioner, the wife in a suit for judicial separation, which had been settled on the terms of an agreement providing for a deed of separation, to the disallowance by the registrar, in her bill of costs of the costs relating to the preparation settling and stamping of such deed.

Bargrave Deane, for the petitioner.
Barnard, for the respondent.

Cur. adv. vult.

Dec. 17. SIR F. H. JEUNE, PRESIDENT. The parties to this suit, which was one for judicial separation, made an agreement for the settlement of it containing the following provisions:—

"A deed of separation to be entered into with all usual clauses, to be settled by Mr. Bayford.

"Mr. Lancaster will pay to Mrs. Lancaster 500*l.* on the execution of the deed, and will consent to pay Mrs. Lancaster 1500*l.* (one thousand five hundred pounds) per annum, payable monthly from the date hereof, the first payment to be due and payable on the first day of December next, and on the first day of each succeeding month. This payment to continue during the joint lives of Mr. and Mrs. Lancaster, and to be in discharge of all claims for or in respect of Mrs. Lancaster and her children.

"Mrs. Lancaster is to have the custody of the children of the marriage, and to provide for their maintenance education and all other expenses out of the annuity hereby provided. Mr. Lancaster is to have access to the children at all reasonable times.

"Mr. Lancaster is to pay Mrs. Lancaster's costs of suit, to be taxed by Mr. Registrar Hannen in case of difference.

"Mrs. Lancaster is to have all the furniture claimed by her, not including the pictures which are to be delivered over to Mr. Lancaster.

"These terms may be made a rule of Court."

Royal Courts of Justice.
Nov. 1, 1894.

Signatures of the parties. Signatures of counsel.

Several questions were raised as to the taxation of costs, but the only question necessary to be decided is whether the husband should pay the wife the costs of settling the deed.

I think it probable that it was intended the husband should pay the costs, because I do not believe that the 500*l.* paid to the wife was for this purpose. When the matter came before me at chambers, I thought the agreement might be treated as in substitution for the order of the Court, and that the working out of the agreement should be treated in the same way as the working out of an order. But, on reconsidering the matter, I have come to the conclusion that this is not so. The agreement is a substantive agreement which (apart from its being made a rule of Court) can be enforced by specific performance. As there is a term that it should be made a rule of Court, it could be made a rule of Court in and enforced by any

Division of the High Court. It appears to me, therefore, that the agreement is not strictly in this suit, nor are the carrying out of it, and the enforcement of it, steps in this suit. It follows that the costs of settling the deed are costs which the parties might have provided for by agreement but have not, and that I have no jurisdiction over them.

Solicitors for petitioner: *Leggatt, Rubinstein & Co.*
Solicitors for respondent: *Greig, Meikle & Briggs.*

H. D. W.

THE PARIS.

1896
Jan. 20.

Admiralty—Solicitor's Lien—Charging Order—Assignment of Sum Recovered—Notice—Solicitors Act, 1860 (23 & 24 *Vict. c.* 127), *s.* 28.

An action of damage by collision was compromised on the terms that the defendants, the owners of the steamship *Paris*, should pay to the plaintiff 50 per cent. of the damages sustained by the plaintiff's vessel, each party to bear their own costs of the action, and the amount of the damages to be ascertained by an arbitrator. Prior to the commencement of the action the defendants' solicitors had been pressing the plaintiff for a settlement of claims of clients of theirs against him, and for their own costs when acting for him; and the plaintiff, after the compromise of the action but before the arbitrator made his award, wrote to the defendants' solicitors that he agreed to their settling the amount due to themselves and to certain named clients of theirs "out of the money coming in from *Paris* s.s."

By his award the arbitrator fixed the sum due from the defendants to the plaintiff, which, with the agreed costs of the reference, made a total of 405*l.* 11*s.* 8*d.*, and the defendants' solicitors forwarded to the plaintiff's solicitors a cheque for a small amount as being the balance out of the above total sum after paying the named clients and themselves. The plaintiff's solicitors took out a summons under s. 28 of the Solicitors Act, 1860, for a charging order. It was admitted that there was no collusion, and it was agreed that the award should be treated as a decree:—

Held, by Sir F. H. Jeune, President, that the plaintiff's solicitors in the action were entitled to an order charging the sum recovered with the plaintiff's costs to be taxed as between solicitor and client, on the ground that the fund recovered by the exertions of the plaintiff's solicitors was fixed, though not worked out, at the date of the compromise, and that the subsequent assignment of the fund was void under the statute as being an act done operating to defeat the right of the solicitors to a lien for costs—

of which right, by reason of the fund being a sum recovered in the action, the defendants' solicitors, and their clients through them, were affected with notice.

SUMMONS (adjourned into court) by the solicitors for the plaintiff, the owner of the steamship *Sam Weller*, for a charging order for their costs upon a sum recovered by way of damages from the defendants, the owners of the steamship *Paris*.

On June 10, 1895, an action of damage by collision was compromised on the terms that the defendants, the owners of the *Paris*, should pay to the plaintiff, the owner of the *Sam Weller*, 50 per cent. of the damages sustained by the plaintiff by reason of the collision, each party to bear their own costs of the action, and the amount of the damages to be ascertained by an arbitrator.

Prior to the commencement of the action the defendants' solicitors (Downing, Holman & Co.) had been pressing the plaintiff, who was admittedly in an impecunious position, for certain club calls due by him to clients of theirs, as well as for their own costs when acting for him; and on June 25 the plaintiff wrote to the defendants' solicitors to the effect that he agreed to their settling the amount due to them and to their (named) clients "out of the money coming in from the *Paris* s.s."

On November 2 the arbitrator made his award, and found the sum of 341*l.* 19*s.* 9*d.* to be due from the defendants to the plaintiff. On November 18 the plaintiff's costs of the reference were agreed at 63*l.* 11*s.* 11*d.*, making a total of 405*l.* 11*s.* 8*d.*

On November 20 the defendants' solicitors wrote to the plaintiff's solicitors (William A. Crump & Son) that they had received the sum of 405*l.* 11*s.* 8*d.*, and, under the authority of the plaintiff, had paid out of it the several sums of 163*l.* 16*s.* 10*d.*, 123*l.* 0*s.* 3*d.*, and 32*l.* 10*s.* to named clients, and had paid themselves 68*l.* 18*s.* 5*d.*, making together 388*l.* 5*s.* 6*d.*, leaving a balance of 17*l.* 6*s.* 2*d.*, for which a cheque was enclosed.

The plaintiff's solicitors claimed 172*l.* 13*s.* 3*d.* (made up of 81*l.* 10*s.* 8*d.* costs of the action, 27*l.* 10*s.* 8*d.* extra costs of the reference, and 63*l.* 11*s.* 11*d.* agreed costs of the reference), and took out a summons under s. 28 of the Solicitors Act, 1860 (1), for a charging order. (2)

It was admitted that there was no collusion, and it was agreed that the award should, for the purposes of the case, be treated as a decree.

Dawson Miller, in support of the summons. The defendants' solicitors cannot defeat the lien of the plaintiff's solicitors for costs by stopping the money passing through their hands on its way from the defendants to the plaintiff, and, under the alleged authority of the plaintiff, pay thereout moneys due from the plaintiff to themselves and to strangers to the action. This is in contravention of the terms of s. 28 of the Act, as being an act done operating to defeat the right of the plaintiff's solicitors to their charge upon the fund recovered by their exertions. The lien for costs has priority over all other claims on the fund except as against a bonâ fide purchaser for value without notice: *Dallow* v. *Garrold.* (3) The notice required by the Act is not necessarily notice of the claim, but notice of the right of the solicitor to the lien. This notice the defendants' solicitors clearly had, as the sum thus distributed was the fund recovered in the action: *Cole* v. *Eley* (1), following *Faithfull* v. *Ewen.* (2) In the case of *The Leader* (3) money paid away under a garnishee order was held to be no satisfaction of the judgment, as the judge who made the order ought to have been told that there was a lien for unpaid costs.

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(1) 23 & 24 Vict. c. 127, s. 28: "In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit matter or proceeding in any court of justice, it shall be lawful for the Court or judge before whom any such suit matter or proceeding has been heard or shall be depending to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved; and upon such declaration being made, such attorney or solicitor shall have a charge upon and against and a right to payment out of the property, of whatsoever nature, tenure or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges and expenses of or in reference to such suit, matter or proceeding; and it shall be lawful for such Court or judge to make such order or orders for taxation of, and for raising and payment of such costs, charges and expenses out of the said property as to such Court or judge shall appear just and proper; and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right, shall, unless made to a bonâ fide purchaser for value without notice, be absolutely void and of no effect as against such charge or right. . . ."

(2) The summons also asked in the alternative for liberty to enforce payment against the defendants' sureties; but as the defendants' solicitors undertook to be personally liable if a charging order was made, this portion of the summons was not proceeded with.

(3) 13 Q. B. D. 543; 14 Q. B. D. 543.

Boyd, contra. Primarily the client of the solicitors is the person to pay his own solicitors' costs. It is only collaterally that a charging order is made, and the Court will not, in its discretion, make such an order unless a primâ facie case is made out that the solicitors cannot get payment in any other way; but here the underwriters on the plaintiff's ship are the real clients of the solicitors, and they are the persons entitled to the fund and liable to their solicitors for these costs. Secondly, the Court will not, in its discretion, make a charging order where, as in this case, there is no fund to be charged, for the money was bonâ fide distributed by the defendants' solicitors, in accordance with the plaintiff's directions, before the Court had any power to deal with the fund; for, even treating the award as a decree, the award was not in existence at the time the authority for the distribution was given. As it is admitted that there was no collusion the case falls within *The Hope* (4), where the plaintiffs and the defendants compromised an Admiralty action for wages, and the Court of Appeal reversed the judgment in favour of the solicitor's lien, given in the Court below, on the ground that there was no evidence that the parties had made a settlement of the action with the intention of depriving the plaintiffs' solicitors of their lien for costs. Again, in *Shippey* v. *Grey* (5) the present Master of the Rolls (then Brett L.J.) said: "If indeed before a solicitor takes any steps the money in question has been disposed of in some way beyond the power of the Court, so that the Court has no longer any jurisdiction over it, then the right of the solicitor would be at an end, for the Court would be powerless to interfere. If for instance . . . . the client should have received the money and paid it over to some creditor of his, in such a case the right of the solicitor would be at an end." So in *Ross* v. *Buxton* (1) Stirling J. in his judgment quotes with approval the words of Lord Kenyon in *Read* v. *Dupper* (2): "If indeed the money had been paid over bonâ fide to the plaintiff before notice from his attorney of his lien, such payment would have been good."

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(1) [1894] 2 Q. B. 180, 350.

(2) 7 Ch. D. 495.

(3) L. R. 2 A. & E. 314.

(4) 8 P. D. 144.

(5) 49 L. J. (Q.B.) 524.

Even if the defendants' solicitors are to be assumed to have had constructive notice of the existence of the solicitors' claim, the clients of the defendants' solicitors, to whom the greater part of the fund was distributed, are strangers to the litigation and without notice.

Dawson Miller, in reply. The fact that the plaintiff's ship was insured, and that the underwriters are mainly interested in the result of the litigation, cannot affect the question of these costs being the costs incurred by the plaintiff on the record, and for which the plaintiff's solicitors are entitled to a lien on the fund recovered. Secondly, no judgment is necessary on which to found the lien if the fund is the fruit of an action, though that action has been compromised: *Ross* v. *Buxton*. (1) This case and that of *Shippey* v. *Grey* (3), cited on the other side, are both in favour of making the charging order.

[The following were also referred to: *Eisdell* v. *Coningham* (4); *Jackson* v. *Smith* (5); *Shaw* v. *Neale* (6); Seton's Judgments and Orders, 5th ed. p. 930.]

SIR F. H. JEUNE, PRESIDENT. [After stating the facts already set out, the learned judge proceeded:—] The question is whether Messrs. Crump are entitled under the Solicitors Act to a declaration giving them a charge upon this fund. Now it is said that they cannot have this for several reasons. First, that before judgment, or before what in the agreement of the parties is equivalent to a judgment, namely, the award of the arbitrator, there was the letter of June 25, in accordance with which the money was actually paid away; so it is said that there is no fund as to which the declaration can be made; and that the case is similar to one in which the plaintiffs and

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(1) 42 Ch. D. 190, at p. 199.

(2) 6 T. R. 361.

(3) 49 L. J. (Q.B.) 524.

(4) 28 L. J. (Ex.) 213.

(5) 53 L. J. (N.S.) (Ch.) 972, at p. 976.

(6) 6 H. L. C. 581.

1896

THE PARIS.

The President.

defendants, behind the backs of their solicitors, compromise an action and bring it to an end, so that there is never any judgment. The money, it is said, has been paid away and is irrecoverable. Now, is that so? I think not. There appear to me to be two answers to the case put forward. In the first place, it is true there was no judgment, or what was equivalent to an actual judgment, until November 2; but there was a compromise early in June, and it appears to me that that fixed, not the actual sum due, because that had to be worked out by the arbitrator, but created property recovered by the exertions of the solicitors. There was a sum which, though its exact amount was not yet ascertained, was recovered within the meaning of the Act. This view is, I think, in accordance with the decision in *Ross* v. *Buxton*. (1)

In the next place, it appears to me that the assignment under which the assignees claim, that is the letter dated June 25, is void within the Act. The terms of the Act are that "all conveyances and acts done to defeat, or which shall operate to defeat such charge or right, shall, unless made to a bonâ fide purchaser for value without notice, be absolutely void and of no effect." Was this an act done to defeat, or which operated to defeat, the charge or right of the plaintiff's solicitors? It clearly was an act which, if valid, operated to defeat the claim of the plaintiff's solicitors. Then, was it made to a bonâ fide purchaser for value without notice? I think it was not made without notice. There was clear notice to Messrs. Downing, Holman & Co., and they were acting as solicitors for the clients to whom they distributed the money. I think there was notice, on the face of the document, that this was money which was to come out of the fruits recovered by the plaintiff in the action of the *Paris*. It seems to me to be clear upon the cases that it is not necessary that there should be notice of any claim of the plaintiff's solicitors on the fund; that it is enough if there is notice that the assignment is out of the fund realized by a successful action. The authority of *Cole* v. *Eley* (2) and of *Dallow* v. *Garrold* (3) appears to be sufficient to shew that. In these circumstances I think that this assignment must be treated for this purpose as void. What, then, is the state of

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(1) 42 Ch. D. 190. (2) [1894] 2 Q. B. 180, 350. (3) 14 Q. B. D. 543.

1896

THE PARIS.

The President.

things? It is that the assignees have obtained money which they were not entitled to have, and in accordance with the authorities it is clear that they are bound to pay back that money, about which, however, no practical difficulty arises, because Messrs. Downing, Holman & Co. have made themselves personally liable for anything which the defendants would have to pay.

I have said that I think this agreement, having been made after the compromise, is in the same position as if it was made after the judgment. But I do not know that that matters, because even if made before the judgment there is authority for saying that it might still have been open to challenge. In the case of *Faithfull* v. *Ewen* (1) the mortgage which was in question, and which was held not to defeat the solicitors' claim, was a mortgage made pendente lite. Two other points have been made. One is that there was no notice to the clients of Messrs. Downing, Holman & Co., to whom the money was paid; but I am clear that notice given to their solicitors acting for them is equivalent to notice to them. Indeed, I do not see how more effective notice could be given than to the solicitors acting for them. The only other point was, if I understand it rightly, that it was not the plaintiff, but the underwriters on the *Sam Weller* who were entitled to receive the amount awarded, as they were the real clients. But the owner of the *Sam Weller* is the plaintiff on the record, and his authority in the matter is so clearly recognised that his order is taken for the distribution of the proceeds. I doubt, indeed, whether the solicitors were acting for anybody except for him; but certainly it is not made out that they were, and beyond question the amount awarded was recovered by their exertions.

In these circumstances I think the applicants, the solicitors of the plaintiff, are entitled to a charge upon this fund.

Order charging the sum recovered with the plaintiff's costs, to be taxed as between solicitor and client.

Solicitors: *William A. Crump & Son; Downing, Holman & Co.*

T. L. M.

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(1) 7 Ch. D. 495.

C. A.
1896
Jan. 27.

[IN THE COURT OF APPEAL.]

THE GERMANIC.

Admiralty—Practice—Parties—Action in Rem—Joinder of Pilot as Defendant.

The plaintiffs, the owners of a steamship, issued a writ in rem against the owners and parties interested in another steamship for damage by collision. The owners of the other steamship appeared, and statements of claim, defence and counter-claim were respectively delivered, the defence including an allegation of compulsory pilotage. The plaintiffs then applied to the district registrar for liberty to add, as a defendant, the pilot who was compulsorily in charge of the other steamship at the time of the collision. The registrar refused the application; but on appeal to the President of the Probate, Divorce, and Admiralty Division the plaintiffs obtained the order on the ground that no difficulty would result from engrafting a claim in personam on an action in rem:—

Held, by the Court of Appeal (Lord Esher M.R., Lopes and Rigby L.JJ.), reversing the decision of the President, that, assuming there was jurisdiction, the order ought not, as a matter of discretion, to be made, as the trial of the action might thereby be embarrassed.

Appeal by the owners, and the pilot, of the steamship *Germanic*, against an order of the President giving the plaintiffs leave to add the pilot as a defendant in an action of damage by collision.

On December 14, 1895, the plaintiffs, the owners of the steamship *Cumbrae*, issued a writ of summons in rem, claiming compensation for damages sustained by reason of a collision three days previously between their steamship and the steamship *Germanic* in the River Mersey. On January 2, 1896, the plaintiffs delivered their statement of claim; and on January 10 the owners of the *Germanic*, as defendants, delivered their defence, including an allegation that "the defendants further say that at the time of the said collision the *Germanic* was in charge of a duly qualified pilot by compulsion of law, and if the said collision was caused or contributed to by the negligent navigation of the *Germanic* which is denied as aforesaid such negligence was that of the said pilot alone." The defendants also counter-claimed for the damages they had sustained by the collision.

On January 15 the Liverpool District Registrar dismissed an application by the plaintiffs to add the pilot as a defendant. On appeal to the President of the Probate, Divorce, and Admiralty Division in chambers this order was rescinded, and liberty given to the plaintiffs to add the pilot, on the ground that no practical difficulty would result from engrafting a claim in personam on an action in rem.

Pursuant to this order the writ was amended so that (omitting portions not now material (1)) it ran: "Between the owners of the steamship or vessel *Cumbrae*, plaintiffs; and the owners of the steamship or vessel *Germanic*, and Robert Llewellyn Roberts, defendants." . . . . "To the owners and parties interested in the steamship *Germanic* of the port of Liverpool, and to Robert Llewellyn Roberts of No. 3, Titus Grove, Crescent Road, Egremont, in the county of Chester. We command you, &c."

On appeal—

Sir Walter Phillimore and *Butler Aspinall*, for the appellants (defendants), the owners of the *Germanic* and her pilot. The joinder of the claim in personam against the pilot in the action in rem against the ship will raise complicated issues which it will be difficult to try together. The rule in Admiralty as to the division of damages in cases of both vessels being to blame applies as between ships only: Judicature Act, 1873, s. 25, sub-s. 9; and the pilot will be entitled to rely upon the common law principles applying to the case of contributory negligence. This is clearly put by the Master of the Rolls and Lopes L.J. in *Reg.* v. *Judge of City of London Court* (2), where the cases are all discussed.

[LOPES L.J. Would not the pilot be entitled to a trial by jury?]

Yes; and as an action in rem in Admiralty is tried by a judge with assessors, the judge finding the facts, and taking the opinion of the assessors on nautical questions only, there might be different findings of the same facts, as it would be the province of the jury to find the facts in respect of the claim in personam against the pilot. This would be embarrassing. Again, by s. 419, sub-s. 4, of the Merchant Shipping Act, 1894, if it should be shewn that the *Germanic* infringed any one of the statutory regulations for preventing collisions at sea, and that the departure from the regulation was not necessary, the Court would be bound to find her to blame; but this statutory rule would not apply to the pilot. There is little direct authority on the question of joinder, but there are good grounds for doubting the jurisdiction of the Court to add the claim against the pilot to the claim against the ship. In *The Bowesfield* (1) Butt J. was of opinion that he had no power to add parties as defendants in personam in an action in rem.

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(1) See Forms Nos. 11, 12, part i., App. A, R. S. C., 1883.

(2) [1892] 1 Q. B. 273, at pp. 299, 302.

Joseph Walton, Q.C., *Pickford, Q.C.*, and *Alexander D. Bateson*, for the respondents (plaintiffs), the owners of the *Cumbrae*. Since the Judicature Acts all persons may be joined as defendants against whom the right to any relief is alleged to exist whether jointly, severally, or in the alternative, and judgment may be given against such one or more of the defendants as may be found to be liable according to their respective liabilities: Order XVI., r. 4. The President had, therefore, full power to add the pilot as a defendant, so that the same evidence of the same facts common to both the case of the ship sued in rem and to the case of the pilot sued in personam might be heard once for all.

[LORD ESHER M.R. The President had no power to make the order as a judge of the Admiralty Court.]

There is no Admiralty Court. It ceased to exist when, by virtue of s. 16 of the Judicature Act, 1873, its jurisdiction was transferred to, and vested in, the High Court of Justice. It is only for the more convenient despatch of business that, under ss. 31 and 34 of the same Act, matters formerly within the exclusive cognisance of the High Court of Admiralty are assigned to the Probate, Divorce, and Admiralty Division. An action against a pilot is not a matter assigned to any Division, and, therefore, the President, as a judge of the High Court, had jurisdiction

(1) 5 Asp. M. L. C. 265.

to make the order in the Admiralty Division, but, even under the exclusive Admiralty jurisdiction, it is at least doubtful whether the order could not be made. In *The Zeta* (1) it was not necessary to decide the question as to suing a pilot in Admiralty; but the House of Lords took a much wider view of the jurisdiction in Admiralty than was laid down by this Court in *Reg.* v. *Judge of City of London Court* (2), and the inclination of the Lords was to question that decision: see the remarks of Lord Herschell. (3) In *The Hollandia* (4) the pilot was joined by Sir James Hannen. It is so stated in *The Bowesfield* (5), and, in that case, two other cases are referred to in argument where personal claims were added to an action in rem. (6) And all that Butt J. said in the case itself was that he could not transform an action in rem into an action in personam. In *The Gemma* (7) Sir Robert Phillimore joined the pilot as a defendant without the consent of the parties. In *The Altyre* (8) the pilot was added as a defendant by order of the registrar. In *The Dispatch* (9) the pilot was joined by consent as a defendant to the counter-claim. In *Child* v. *Stenning* (10) Mellish L.J. said that where the plaintiff seeks compensation for one wrongful act, but cannot tell which of two parties is really liable, there is liberty to join, as that is exactly the case intended to be provided for under the rules. The real question is whether any injustice will result from the joinder, and it is submitted that there can be none in adding the pilot to the other defendants.

[LORD ESHER M.R. There are no other defendants. The owners of the ship only appear to protect their interest in the res. The writ in rem is not served on them, but is nailed to the mast. How was this writ served?]

In the majority of cases, and in this case, the formality of nailing to the mast is dispensed with, and, under Order IX., r. 10, the solicitors for the owners agree to accept service. The pilot was personally served.

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(1) [1893] A. C. 468.
(2) [1892] 1 Q. B. 273.
(3) [1893] A. C. 468, at p. 486.
(4) Not reported.
(5) 5 Asp. M. L. C. 265, at p. 266.
(6) *The Native Pearl*, 3 Asp. M. L. C. 515; *The Annandale*, 2 P. D. 179, note (1).
(7) 1881, Fol. 471 (not reported).
(8) 1884, Fol. 393 (not reported).
(9) 1885, Fol. 480 (not reported).
(10) 5 Ch. D. 695, at p. 702.

[Lopes L.J. If the pilot claims the right of trial by jury, how will the case proceed?]

The case of the pilot would then, in the discretion of the judge, be postponed until after the trial of the action against the ship; but that point has not yet arisen.

[Lord Esher M.R. What is the object of joining the pilot?]

To insure his attendance to give evidence, and to fix him with responsibility if he be found to blame.

Sir Walter Phillimore, in reply. The action in rem against the ship would be tried as an Admiralty cause by a judge sitting in Admiralty with assessors under Admiralty jurisdiction. The Admiralty Court as such had, and the Admiralty Division as representing it has, no jurisdiction in an action in personam against a pilot. That was decided by this Court in *Reg.* v. *Judge of City of London Court.* (1) The joinder has, therefore, been made by virtue of the jurisdiction of the President as a judge of the High Court; but, assuming such jurisdiction to exist, it is submitted that it ought not, as a matter of discretion, to be exercised, as grave difficulties would arise.

[The following cases were also referred to: *Hannay* v. *Smurthwaite* (2); *The Hope.* (3)]

Lord Esher M.R. In this case, when the parties who applied for this order originally instituted their suit, they brought their action only against the ship and the owners of the ship and those interested in it. It is after they have brought that action that they are asking for leave to do something, namely, to add somebody else, that is, the pilot. It is not as if they had, when they began their litigation, begun it jointly against the owners of the ship and against the ship and the pilot. With that case we have nothing to do at the present. Having begun against the ship and the owners of the ship, they now come to ask for the assistance of the Court to enable them to join the pilot. This renders it unnecessary to determine whether the Court has jurisdiction to join the pilot or not. As at present inclined I think that it has; and therefore I shall assume that the Court has jurisdiction. Then comes the question, How ought that jurisdiction under such circumstances to be exercised? If this Court upon appeal is of opinion that the learned judge in the Admiralty Division has exercised the discretion vested in him inadvisedly, there is no doubt that this Court has the power, and ought to alter that exercise of his discretion. Now, the case when it came before the learned judge must have been presented to him in two different views. I have not the least doubt that he was asked to take into consideration what would be the consequences of making the order. One view of what he was asked to do would very probably lead to great inconvenience; the other view that he could take would lead to no real inconvenience. It seems to me, therefore, that the proper exercise of his discretion was not to run the risk of possible great inconvenience, but to leave the case as it was, so that there would be no inconvenience at all. He was asked to join the pilot, and it is an admitted fact that if he did so the joinder might cause—and in this case after this discussion, I have no doubt would, in all probability, cause—great inconvenience. The pilot would have a right to ask to be tried by jury; and, considering what has been said here, can there be any doubt but that the pilot would be so advised? Then the case as between the two ships and the owners of the two ships will be tried by the judge and assessors; and then the case between the ship to which the pilot did not belong and the pilot will be tried by the same judge and a jury, or if they are to be tried at the same time under those circumstances there would of necessity be unseemliness and inconvenience. There would also be difficulty in drawing up the two judgments—the one as against the ship and its owner, and the other as against the pilot; but to this point I do not attach much importance. On the other hand, if the case is left as it is, what can be the inconvenience? Counsel for the respondents say, "We can, after having tried the case as between the owners of the two ships, sue the pilot; and if the cause is not removed, then the judge of the Admiralty Court may try it against the pilot with a jury." Of course that may be; but can I suppose that if they tried the case as between the two ships, and either succeeded or failed, they would then go against the pilot with a jury? What chance could they have with a jury, and what damages could they get from the pilot? No doubt there is a legal right against the pilot; but it is not one which they would ever think worth trying. I think, therefore, that on the one side there is every probability of inconvenience, and on the other side no inconvenience at all; and no valid ground has been shewn why the pilot should be joined. I think, therefore, the proper discretion which ought to have been exercised was to refuse the application.

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(1) [1892] 1 Q. B. 273.

(2) [1893] 2 Q. B. 412.

(3) 1 Wm. Rob. 154.

Lopes L.J. The writ in the first instance in this case was issued against the ship and her owners, and not against the pilot. The joining of the pilot was an afterthought, and it is in respect of that afterthought that this application was made to the President, who granted it. Against his decision the present appeal is brought. Now I assume, for the purpose of the few words I am going to say, that the Court had jurisdiction to grant this application if it thought fit. The question which we have to consider is: How far is it expedient so to do? In considering that question we have to look at what I will call the convenience or inconvenience on the one side or the other. It seems to me if we grant the application to join the pilot it would be a highly inconvenient course, and one which would cause embarrassment when the action came to be tried. It has been truly said that the learned judge who had to try it would have to lay down two different rules. Damage as against the ship would be calculated on one principle, and the question whether both were to blame would have to be considered, and, as regards the pilot, the question of contributory negligence would have to be considered, and a different rule of damage would have to be applied. I do not attach much importance to that, however, because it could easily be dealt with by the judge. But there is another matter. In the ordinary course the case against the ship would be tried by the judge with assessors. The case against the pilot, on the other hand, if the pilot thought fit, would have to be tried by a jury.

If the pilot exercised that right, and I do not know that he would not, very serious inconvenience would arise. There would be, as it were, almost two trials going on concurrently, and I cannot see how the matter could be carried out with any amount of propriety. On the one side there seems to me to be serious inconvenience which may have to be encountered, and, adopting the other view, no inconvenience or difficulty at all. What is the alternative? It appears to me that the Court has only one course to pursue, and that is to pursue that course which is surrounded by no difficulties. For these reasons I think the application to join the pilot ought not to have been granted.

RIGBY L.J. I am of the same opinion. I think this is a question of discretion, and, assuming that there is jurisdiction, we must look to the probable result of joining the pilot. That the case could then be tried as one case seems to me most improbable. I think, therefore, that in this case it is not desirable that he should be joined.

Appeal allowed.

Solicitors for plaintiffs, the owners of the *Cumbrae*: *Batesons, Warr & Wimshurst, Liverpool.*

Solicitors for defendants, the owners of the *Germanic*, and her pilot: *Hill, Dickinson & Co., Liverpool.*

T. L. M.

1896
Jan. 8.

[IN THE CONSISTORY COURT OF SOUTHWELL.]

THE OFFICE OF THE JUDGE PROMOTED BY MORLEY AND ANN *v.* LEACROFT.

Ecclesiastical Law—Jurisdiction—Criminal Suit promoted by Churchwardens against Lay Rector to compel Repair of Chancel—Monition.

The articles in a criminal suit promoted by the churchwardens of a parish against the lay rector of a parish church, charged that the chancel of the church was in a very dilapidated condition, and that the respondent, though legally bound to repair it, had for four years refused and neglected to do so. On the respondent giving an affirmative issue to the articles and submitting to judgment, the Ordinary pronounced that the respondent had offended against the ecclesiastical law, and admonished him to do the repairs required.

This was a cause of office at the voluntary promotion of William Morley and Edwin Thomas Ann, the churchwardens of the parish of St. Peter, Derby, against Edward Ranulph Leacroft, of Matlock, in the county of Derby and diocese of Derby, ... "for the lawful correction and reformation of his manners and excesses, and especially for refusing or neglecting to rebuild or repair the chancel of the parish church of St. Peter, Derby, aforesaid."

The suit was now called on before the Chancellor of the Diocese of Southwell (A. B. Kempe, Esq.).

The Chancellor. In this case proceedings have been instituted in this Court in a criminal form at the promotion of the churchwardens of the parish of St. Peter, Derby, in the county of Derby and diocese of Southwell, against Edward Ranulph Leacroft, of Matlock, in the same county and diocese, the lay rector of the parish church and parish of St. Peter, Derby, for the purpose of compelling him to repair the chancel of the parish church. After some delay an appearance in the cause was entered for the respondent, and articles were brought in, to the admission of which, in the first place, a notice of objection was filed on his behalf. Ultimately the articles in

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the suit were admitted without any objection being taken to them; and the respondent appeared in person in the registry, and handed into the registry an instrument in writing whereby he declared that he gave an affirmative issue to the articles, and submitted himself to the judgment of the Court. The articles having been thus admitted, and an affirmative issue given to them, the Court must assume that the allegations therein contained represent the true facts of this case. It appears from the articles that as long ago as October, 1891, the attention of the respondent was called to the dilapidated condition of the chancel of St. Peter, Derby. Now, by the law of England, a layman may be the rector of a parish church, and may enjoy all the profits and tithes annexed to the rectory; but in the absence of proof that by custom or special statutory provision the duty to repair is to fall upon the parishioners—*Hawkins's Case* (1); *The Bishop of Ely* v. *Gibbons* (2)—or others—*Williams* v. *Bond* (3)—the right to be rector and enjoy the profits and tithes of the rectory carries with it the duty of repairing the chancel of the parish church: *Serjeant Davies Case* (4); *Pense* v. *Prouse* (5); *Griffin* v. *Deighton* (6); the freehold of such church being vested in him. In this case the respondent admits that he is the lay rector of St. Peter, Derby, and as such lay rector is legally bound and compellable to repair the chancel of that church; that he has before now done such repairs, and that the chancel he is so bound and compellable to repair is now and has been for some time in a very dilapidated condition—indeed, in such a condition that the wet comes through the roof. He also admits that for four years he has resisted the application of the churchwardens to repair the chancel. Under these circumstances it is not easy to see how the churchwardens have had any alternative but to take these proceedings against him. There are many lay rectors in England bound to repair the chancels of the churches of which they are rectors; but I am happy to think that suits of

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(1) 5 Mod. 390.
(2) 4 Hagg. Ecc. 156.
(3) 2 Vent. 238.
(4) 2 Roll. Rep. 211.
(5) 1 Ld. Raym. 59.
(6) 5 B. & S. 93, 108; 33 L. J. (Q.B.) 29, 181.

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the description of the present are rare in the extreme, though clearly within the jurisdiction of the Spiritual Courts: 1 Burn's Ecclesiastical Law, 248, 249, ed. 1763; *Wallwin* v. *Auberry* (1); and see *Anon.* (2); Hale's Precedents in Causes of Office against Churchwardens and Others, pp. 23, 84–5; *Seger* v. *The Dean and Chapter of Christ Church* (3); *Buckenham* v. *Gounter.* (4) The only duty I have therefore now to perform is to pronounce that the respondent has offended against the law ecclesiastical in not having repaired the chancel of the parish church of St. Peter, Derby, and that he be admonished that he do forthwith repair the dilapidations set forth in the articles; and, having regard to the long period which has elapsed during which the respondent has refused and neglected to accede to the repeated requests of the churchwardens to do any of the repairs, I think it expedient to add that the Court has full power to enforce its order (see 53 Geo. 3, c. 127), and, indeed, it is bound to do so if the churchwardens should come before the Court and desire the aid of the Court for that purpose, and shew that the order has been contumaciously disobeyed.

The respondent must be condemned in the costs of the proceedings; and a monition to the effect I have just stated will, on application for it by the promoters, issue from the registry.

Solicitors for promoters: *Ransom & Hutton.*
Solicitor for respondent: *Close.*

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(1) 2 Vent. 35.

(2) 3 Keb. 829.

(3) Cited in *Wilson* v. *M'Math*, 3 Phillim. 67, at p. 90.

(4) Rothery's Return of Cases before the Delegates, Nos. 77, 78, p. 35.

C. F. J.

[IN THE ARCHES COURT OF CANTERBURY.]

1894
July 13;
Nov. 6.
1895
Dec. 19.

[ON APPEAL FROM THE CONSISTORY COURT OF LONDON.]

THE RECTOR AND CHURCHWARDENS OF ST. GABRIEL, FENCHURCH STREET, AND OTHERS *v.* THE CITY OF LONDON REAL PROPERTY COMPANY, LIMITED.

Ecclesiastical Law — Faculty — Exclusive Right to Use of Pathway across closed Churchyard—Construction of Faculty—Refusal to grant subsequent Faculty derogating from previous Grant—Ecclesiastical Leasing Acts, 1842 *and* 1858 (5 *&* 6 *Vict. c.* 108; 21 *&* 22 *Vict. c.* 57)*—Practice—Refusal of Appellate Court to interfere with Discretion of Ordinary.*

In 1891 a faculty issued from the registry of the Consistory Court of London authorizing the rector and churchwardens of a parish in the City of London, in conjunction with a company owning premises abutting on the churchyard of the parish—a churchyard closed for burials under Order in Council—to make a pathway inclosed on the sides by railings, across the churchyard from the company's premises to a public thoroughfare on the opposite side of the churchyard, provided a specified rent was paid to the rector and his successors during a term of years. The faculty recited an agreement between the rector and churchwardens and the company whereby the former agreed to concur in granting to the company a right of way over the pathway afterwards authorized by the faculty for the term, and on payment of the rent there mentioned: all the works to be done at the company's costs, and "such right of footway to be for themselves their tenants and any others authorized by them in common with the rector and churchwardens and any others authorized by the rector and churchwardens." In 1892, after the company had done and paid for the works and whilst the term of years was still unexpired, the rector and churchwardens agreed with other owners of premises abutting on the churchyard adjacent to the company's premises to concur in granting to such owners a right of footway over the pathway made under the faculty of 1891, subject to the rights of the company, and also over a new footpath to be made over a piece of the churchyard to join the footpath so already made, and petitioned the Consistory Court of London for a faculty to make the new footpath and to remove a portion of the above-mentioned railings; the owners of the premises desiring the right of way over the two footpaths intervening in support of the petition:—

Held, by the Consistory Court of London, that the faculty asked for must be refused, as the faculty of 1891 had granted to the company and their assigns the enjoyment for a term of years not yet expired of the pathway made under that faculty to the exclusion of the other occupiers of premises

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abutting on the churchyard, and the Ordinary ought not to sanction by faculty anything being done in derogation of the exclusive right so granted:

Held further, by the same Court, that the operation of the Ecclesiastical Leasing Acts of 1842 and 1858 is confined to glebe lands and property of that description, and does not extend to enable the incumbent of a parish, with the consent of the patron of the living and the Ecclesiastical Commissioners, to grant leases of or rights over all or any portion of the churchyard of the parish.

Held, on appeal by the Arches Court of Canterbury, that the construction put on that faculty by the Court below was correct, and, the grant or refusal of the faculty prayed being in the discretion of the Ordinary, by whom that discretion had been properly exercised, the appellate Court ought not to interfere, and the appeal must be dismissed.

Observations by the Chancellor of the Diocese of London as to the practice of the Consistory Court of London on the grant of faculties for the formation and use of private pathways across churchyards closed for burials, and as to the provisoes to be inserted in such faculties.

This was an appeal from the Consistory Court of London.

On October 18, 1893, a petition on behalf of the Rev. T. L. Fish, the rector, and J. G. Fleet and R. C. Haldane, the churchwardens of the parish of St. Gabriel, Fenchurch Street, in the City of London, was filed in the registry of the Court below, praying that Court to decree a faculty authorizing the said rector and churchwardens, in conjunction with Elizabeth Corbett, C. H. Corbett, and J. S. Corbett, of Imber Court, Thames Ditton, Surrey, and J. Byrne, of Old Broad Street, London, trustees of the will of C. J. Corbett, deceased, to make a pathway from a house known as No. 4, Cullum Street, in the City of London, belonging to the said trustees, and abutting on the churchyard of St. Gabriel, Fenchurch Street, over a portion of the said churchyard as far as and leading into another pathway in the said churchyard between certain property belonging to the City of London Real Property Company and Fen Court, made and inclosed on the sides by railings under a previous faculty issued by the Consistory Court of London on April 30, 1891, to the rector and the churchwardens of St. Gabriel, Fenchurch Street, in conjunction with the City of London Real Property Company, Limited (1), and also certain

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(1) This faculty gave and granted to the rector and churchwardens of St. Gabriel and their successors in office, in conjunction with the City of London Real Property Company, Limited, leave, license, and faculty

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other alterations and structures mentioned in an agreement of October 22, 1892, between the rector and churchwardens of St. Gabriel, Fenchurch Street, and the said trustees.

By this agreement, in consideration of the yearly rent of 10*l.* (afterwards by agreement between the parties increased to the yearly rent of 25*l.*), and the performance of the conditions and agreements therein mentioned, the rector and churchwardens of St. Gabriel, so far as they lawfully might, concurred in granting to the trustees of Mr. Corbett's will for a term of eighty years a right of footway over both that portion of the churchyard of St. Gabriel's in which it was sought to make the

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authorizing them to make a pathway through the churchyard of the parish of St. Gabriel, Fenchurch Street, nine feet wide from east to west, and from thirty feet from south to north, measured from the wall of the house, No. 150, Fenchurch Street, six feet wide and no more across the said churchyard from Fen Court to the said property of the company; and to make the other alterations and structures mentioned in the agreement recited in the petition and in accordance with the petition, and a plan filed in the registry provided, inter alia, "that the rent of 45*l.* per annum be paid by quarterly payments" to the rector and the churchwardens of St. Gabriel, Fenchurch Street, and their successors "during the term of 80 years from the 24th day of June, 1890." The agreement so recited in the petition was an agreement of April 24, 1890, between the rector and churchwardens of St. Gabriel, Fenchurch Street, and the City of London Real Property Company, described as the owners of property abutting on the west side of the churchyard of St. Gabriel, Fenchurch Street, and after declaring that the rector and churchwardens of the parish "so far as they could or might concurred in granting to the company a right of footway of the dimensions referred to above, continued so far as material as follows: "The said rights of footway to be for themselves their tenants and any others having business with or authorized by them in common with the rector and churchwardens and any others authorized by the rector and churchwardens across the churchyard of the parish of St. Gabriel Fenchurch, from Fen Court to the said property of the company; the right of way to be for the term of 80 years from the 24th June 1890 at a yearly rent payable to the rector of 45*l.* The pathway over which the said right of way is to be granted shall be laid out paved drained and fenced in, with iron railings and gates . . . . and all such works shall be executed at the cost of the company." The agreement further provided for a deed of grant of right of way being prepared to contain clauses and provisions therein mentioned as to the persons entitled to use the footway; as to keys to the locks of the gates at the entrance of the pathway in Fen Court being supplied to the rector and churchwardens; and as to the company keeping the pathway railings and gates in repair.

new footpath referred to in the prayer of the petition, and also over that other portion of the churchyard over which the City of London Real Property Company had made a footpath under the faculty of April 30, 1891, as above mentioned, "subject as regards this last footway or passage to the rights of the said City of London Real Property Company, Limited, under the grant by way of lease to them dated July 27, 1891, and the clauses and conditions therein contained." (1)

The agreement of October 22, 1892, inter alia, further provided that in making and laying out the new pathway above mentioned the trustees should be at liberty to remove so much of the railing inclosing the footpath made under the faculty of April, 1891, on the left hand going towards Fen Court as might be necessary for that purpose; directed the paving, fencing, and draining of the new pathway, and the repair of it and the fencing thereof at the costs of the trustees, and contained an undertaking by them to make good all damage occasioned by reason of the execution of the proposed works which it was provided were to be executed so as not in any way to interfere with or obstruct the free use and enjoyment by the City of London Real Property Company and certain tenants and occupiers of certain premises belonging to them of the footpath made under the faculty of 1891. A plan and specification shewing the proposed new pathway coloured red, and the existing pathway coloured yellow, and the other alterations and structures approved by the petitioners, was filed in the registry together with the petition.

The usual citation with intimation having issued, the City of London Real Property Company, on November 16, 1893, appeared to defend the suit, and prayed to be heard in objection to the grant of faculty (2); and on July 13, 1894, an appear-

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(1) The portion of this deed material to this report is referred to in the judgment of Dr. Tristram, p. 101, post.

(2) Their solicitors, on July 12, 1894, brought in an answer to the petition, in which they alleged, in substance, that the faculty ought not to be granted for the following reasons:—

1. Because the petitioners are seeking for it in breach of an agreement between them and the defendants, on the faith of which agreement the defendants incurred expense in and

ance was entered on behalf of the trustees of Mr. Corbett's will as interveners in support of the petition.

1894. July 13. The case was heard before the Chancellor of the Diocese of London (Dr. Tristram, Q.C.).

Witnesses were examined orally in Court on behalf of the petitioners and of the defendants. The result of their evidence appears from the judgments.

H. C. Richards, and *Soper*, for the petitioners.

A. B. Kempe, for Mr. Corbett's trustees.

Sir Walter Phillimore, and *Priestley*, for the defendants.

Cur. adv. vult.

1894. Nov. 6. DR. TRISTRAM. The petitioners in this case are the rector and churchwardens of St. Gabriel, Fenchurch Street, and the City of London Real Property Company, Limited, are the defendants.

The petitioners have applied to the Court to grant a faculty for the purpose of enabling the owners and occupiers of a house, No. 4, Cullum Street, abutting on St. Gabriel's churchyard, to have the use of a pathway leading from the back of Nos. 35 and 36, Lime Street across the churchyard into Fen Court, the use of which had been granted to the company by faculty. This footway was constructed by the defendant company at considerable cost under a faculty issued from this Court, and dated April 30, 1891. The parish church of St. Gabriel, Fenchurch Street, was destroyed in the great fire of London, and

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about obtaining the faculty of April 30, 1891, and in and about forming the pathway referred to in the said faculty [the pathway coloured yellow in the plan filed in the registry], and in erecting the railings and gates to the said pathway, and have entered into covenants with respect to the same.

2. Because if the said faculty sought were granted the burden of maintaining the said pathway put upon the defendants by the faculty of 1891 and the indenture of July 27, 1891, made in pursuance thereof would be enlarged and altered, and made more difficult of execution, and more onerous.

3. Because of the several objections raised by the defendants in their correspondence with the petitioners beginning on July 7, 1893.

was not rebuilt. By 22 Car. 2, c. 11, the advowson of St. Gabriel's was united to that of St. Margaret's Patten; but the Act provides that the churchyard in question, which, however, is now closed for burials under an Order in Council, shall be reserved for the use of the parishioners of St. Gabriel's; that they shall have a separate vestry and separate churchwardens; and that the patronage shall be vested alternatively in the Crown and the Corporation of the City of London. The company oppose the faculty now asked for on the ground that it will prejudice their rights under the faculty of 1891, which their counsel contended had substantially secured to them the exclusive right of the use of the pathway for eighty years, in consideration of the costs incurred by them in constructing it, as well as of their undertaking to keep it in repair, and pay to the rector of the parish and his successors a rental of 45*l.* per annum for its use. The contention of the petitioners' counsel, on the other hand, was that no such exclusive right had been secured to the defendants, either by the faculty of 1891 or by a deed of grant made subsequently to the faculty, and dated July 27, 1891, containing provisions and terms not contemplated by the faculty. Prior to, and in contemplation of, the application for the faculty, an agreement, dated April 24, 1890, was entered into between the rector and churchwardens and the company commencing as follows: "The rector and churchwardens so far as they can or may concur in granting to the company a footway of certain dimensions" (therein specified), "from Fen Court to the back of Nos. 35 and 36, Lime Street, the property of the said company, the said right of footway to be for themselves, their tenants, and any others having business with or authorized by them, in common with the rector and churchwardens, and any others authorized by the rector and churchwardens." This agreement is recited in full in the faculty; but the terms above mentioned are not embodied as they should have been in the operative part of the faculty, in accordance with the practice of the Court. The circumstances which led to this omission I will presently state. In the operative part of the faculty "leave is given to the petitioners and the company to make the pathway in question, and to make other alterations and structures mentioned in the agreement recited in the petition, and in accordance with the petition filed in the registry, provided that the rent of 45*l.* per annum be paid by quarterly payments to the present rector and to his successors, rectors of the said parish, during the term of eighty years." It appears by a recital in the faculty, and by the evidence given before me in 1891, when the faculty was moved for, that the Lord Chancellor and the Corporation of the City of London, as patrons of the living, as well as the Ecclesiastical Commissioners, had approved of the arrangement and of the object of the petition, and were willing to be parties to any deed necessary for carrying it into effect. A deed was executed dated July 27, 1891, between the rector and the company, with the churchwardens and the patrons as consenting parties to it; but as the terms of this deed were not submitted to me for my approval, and as some of them are in contravention of ecclesiastical law, the arrangement made in it will not affect my judgment in the present case. By this deed the rector purports to demise to the company and their assigns for eighty years the right of way along the pathway to be constructed under the faculty in consideration of the rent of 45*l.* per annum, and the deed contains a covenant on the part of the company and their assigns for the payment of this rent by quarterly instalments. This deed was framed on the erroneous supposition that a rector is entitled to demise rights over the churchyard of the parish with the above consents under the Ecclesiastical Leasing Acts, 1842 and 1858 (5 & 6 Vict. c. 108, and 21 & 22 Vict. c. 57). These Acts are, however, beyond all doubt, limited in their operation to glebe lands and property of that description, and cannot, on any reasonable interpretation or in law, be extended to churchyards, and for this reason: churchyards are by the law placed under the protection and control of the Ecclesiastical Courts and the freehold of the churchyard is in the rector, the fee being in abeyance; but the freehold is vested in him for the use (in so far as may be required) of the parishioners. Subject to that use, he is entitled to receive the profits arising from the churchyard; but he cannot by law make any appropriation of the soil of the churchyard. Such appropriation can only be made for limited purposes by a faculty issued from the Ecclesiastical Court. I have before observed that the faculty does not contain, in accordance with the practice of the Court, words granting in express terms to the company and their assigns the use of the pathway for eighty years; but it is within my recollection that these words were omitted by the request of the parties as communicated to the registry.

The question for this Court, therefore, now to determine is whether, in the absence of such express words, the faculty, reading it as a whole, contemplates that the company and their assigns should enjoy for eighty years the use of the pathway, to the exclusion of the other occupiers of premises abutting on the churchyard; and, in my judgment, the faculty should be so construed.

The whole cost of constructing the pathway and of railing it in, as well as the rent, is to be paid by the company, and the railings are to be so constructed as to prevent the occupiers of other premises abutting on the churchyard from making use of the footpath. The only reasonable construction of the arrangement is that it was entered into by the company for the exclusive benefit of their own property, and not for that of their neighbours.

But it was contended by counsel for the petitioners, as well as by counsel for the Corbett trustees, who are the owners of No. 4, Cullum Street, and who have intervened in this case, and on whose behalf the application for the faculty now sought is made, that as by the agreement recited in the faculty of 1891 the rector and churchwardens, and any others authorized by the rector and churchwardens, were to have the use of the pathway, the Court, in the exercise of its discretion, would be entitled to authorize by faculty, at the instance of the rector and churchwardens, such an alteration in the railings as would enable the occupiers of No. 4, Cullum Street to make use of the footpath. But it appears to the Court that the words, "any others authorized by the rector and churchwardens," must be taken to refer to agents of the rector and churchwardens, who might, for example, have occasion to pass along the pathway on business in connection with the churchyard, and not to tenants of the

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adjoining houses. The Court has, therefore, come to the conclusion that it would not be justified, without the consent of the company, in authorizing any interference with the railings erected under the previous faculty of 1891, for the purpose of enabling the pathway, coloured yellow on the plan referred to in the petition, to be used by the owners of No. 4, Cullum Street, who, according to the evidence, stood aloof from joining in the application for that faculty or in the expenditure incurred in constructing the pathway in question.

I have inspected the churchyard since the hearing of this case, and I should be prepared to grant such a faculty (unless the petitioners and the defendants can come to terms such as the Court can ratify) as would enable the Corbett trustees to have an independent pathway from their premises to Fen Court, subject to the payment of a rent of 25*l.* a year to the rector.

There are only two other houses besides No. 4, Cullum Street, abutting on that side of the churchyard to which a pathway might hereafter be of consequence; and if the faculty were granted, it should be subject to a proviso that the owners of such houses might hereafter be admitted to its use by a faculty upon payment to the Corbett trustees or their assigns of such a sum, and to the rector of such a rent, and upon such terms, as to the Court might appear to be equitable.

In granting faculties of this description, I think it is advisable that the owners of premises for whose convenience such grants are made should be required to enter into a covenant for the payment of the rent, so as to give the rector a remedy at common law for its recovery; and the fact that the rector is a consenting and assenting party to the owners obtaining the faculty would in itself be a sufficient consideration to support the covenant, and by way of strengthening the consideration I should be prepared to grant the faculty subject to the proviso that the owner of the premises shall enter into such a covenant.

It has been the practice of the Court in similar cases to the present, for its own guidance and assistance, to require the patron of the benefice and the Ecclesiastical Commissioners to be consulted as to the sufficiency of the rent proposed to be secured to the rector. The patron has an interest in seeing

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that the pecuniary value of the benefice is not unduly prejudiced by the arrangement; and the Ecclesiastical Commissioners are in a position to afford the Court the best possible advice as to the adequacy of the proposed payment. It is for this reason and not on the ground that their consent to the grant of the faculty is required by law, that their advice and approval is asked.

The Court reserves making any order as to costs until it is informed by the parties what course they propose to adopt in the case. I therefore consider it will be better for the case to stand over, in order to give the parties the opportunity of coming to some settlement.

Against the decree entered in the registry of the Court below in pursuance of this judgment both the petitioners and the interveners appealed.

1895. Dec. 19. The appeal was heard before the Dean of Arches (the Right Honourable Lord Penzance).

Channell, Q.C., and *A. B. Kempe*, for the appellants. The Ordinary ought to have granted the faculty asked for. He considered he was precluded from doing so by the faculty of 1891, but he wrongly construed that faculty as having granted an exclusive right to the respondents to use the footpath coloured yellow. Such a construction is, however, one which neither the faculty in question nor the agreement recited in it can properly bear. The faculty purports merely to authorize the respondents to make the footpath and execute other works in the churchyard, and although by implication a right to the respondents and their assigns to pass along the path may be included there is no valid reason for holding that such licence is wider in its terms than a licence at the common law to go over land—a licence which has never been said to entitle the licensee to exclude other persons from obtaining from the owner of the land a right to share in the same right of way. Further, there are to be found in the agreement recited in the faculty words pointing to the appellants' view being the correct one, and to persons authorized by the rector and churchwardens making use of the pathway. The fact of the respondents having incurred expenses in making and maintaining the footway and the other structures mentioned in the faculty cannot properly be prayed in aid by the respondents as an argument in favour of the right given by the faculty being an exclusive right, for whatever expenses have been so incurred have been incurred by them on a wrong construction of their own grant; but, however this may be, the appellants are prepared, if the faculty prayed is granted, to take on themselves an equitable share of all such expenses. Again, to put the construction the respondents contend for on the faculty of 1891 would be to construe it to be a faculty which the Court below had no jurisdiction to grant—a faculty to grant an exclusive right to a private individual over the soil of a consecrated churchyard being an appropriation of the churchyard to secular purposes which no Ecclesiastical Court can legalise: see *Harper* v. *Forbes* (1); *The Rector of St. John's, Walbrook* v. *The Parishioners of the Same* (2); *Reg.* v. *Twiss.* (3) On the other hand, and adopting the construction the appellants put on the faculty, i.e., construing it merely as conferring a right with other persons authorized by the rector and churchwardens to pass along the footpath, the faculty contravenes no principle of ecclesiastical law, but merely carries out an arrangement which, subject to the grant of a faculty (Phillimore's Ecclesiastical Law, vol. ii. p. 1408), the rector had clearly a right to make according to the decision of the Court of Queen's Bench in *Greenslade* v. *Darby.* (4) In that case, where the right of the tenants of a rector depasturing the churchyard with sheep came into question, Blackburn J., whilst admitting that in the case of a parish churchyard the land having been "set apart by consecration, the right which the rector as the owner of the freehold had in the profits was proportionately diminished, because he could not desecrate or use it for any purpose which was inconsistent with the object of the consecration," laid down the principle that subject to this "the enjoyment of the property so far as it could be exercised by one holding a sacred office belonged to the

(1) 5 Jur. (N.S.) 275.

(2) 2 Roberts. 515.

(3) L. R. 4 Q. B. 407.

(4) L. R. 3 Q. B. 421.

rector as owner of the freehold"; the profits to be derived from the grazing of the churchyard being referred to as an example of the profits so belonging to the rector. Moreover, for permitting a licensee to use a footpath in the churchyard or make a private door into the same, the rector may legally require a money consideration to be paid: *Maidman* v. *Malpas*. (1) Construing the faculty as merely granting such a licence, no such difficulty with respect to altering the railings of the footpath would arise, as would be the case if the respondents' construction prevailed, and an attempt was afterwards made to turn the churchyard into a public garden under the Metropolitan Open Spaces Act, 1881 (44 & 45 Vict. c. 34).

[They also referred to *Walter* v. *Mountague* (2) and *Hutchins* v. *Denziloe*. (3)]

Sir Walter Phillimore, and *Priestley*, appeared for the respondents, but were not called upon to argue.

LORD PENZANCE. This was an application to the discretion of the Court for the grant of a faculty which has been refused by the Chancellor of the Diocese of London.

The appellants ask for a faculty granting them permission to use a certain pathway across a churchyard which was made by the respondents under the authority of a faculty granted by the Chancellor of London.

The respondents object to the grant now sought upon the ground that to make it would be to derogate from the faculty already granted to them.

I have never had any doubt in this case after I had once read the papers.

The only question in substance is, whether it is true that the faculty now sought could not be granted without derogating from the previous faculty. I think it is undoubtedly true. For what was it that the previous faculty secured to the respondents? The agreement between the respondents and the rector provided that the respondents should at their own cost make and lay down a proper pathway of a certain definite width across

(1) 1 Hagg. Cons. 205.

(2) 1 Curt. 253, at p. 261.

(3) 1 Hagg. Cons. 170, at p. 172.

the churchyard; that they should keep it in repair during the term of eighty years, and pay a rent of 45*l.* a year for the right to use it; that it should be for their use and for that of the rector and churchwardens; that for the purpose of excluding other people they should inclose the pathway entirely with iron railings, putting up proper gates and locks at the proper places, and furnishing the rector and churchwardens with proper keys for them.

Now what the appellants ask for is a faculty authorizing them to pull down such portion of these iron railings as is necessary to enable them to make use of the pathway in the way they desire. I own that I am unable to perceive how this can be regarded as otherwise than an interference with the state of things especially set up and established by the agreement with the parish authorities and the faculty which confirmed it and authorized the work under it.

What the first faculty authorized to be done the faculty now sought would authorize to be undone. I cannot think that the discretion of the Court would be well exercised in making such a grant as that.

Under these circumstances I think the learned Chancellor of the Diocese of London was quite right.

Now, it has been said that the faculty could not create a right of an exclusive character which could not afterwards be interfered with. But it is not a question of what the legal rights were which were granted by the faculty. The question is, what rights were intended to be conferred by the faculty, and how far those rights could properly be considered as rights that might be afterwards interfered with, by conferring similar rights on other people over the same pathway.

Something has been said about the rights which can be legally granted in or over churchyards. The exact nature of the rights granted is always in these cases a more or less puzzling thing; but the right conferred by the agreement entered into previous to the grant of the faculty is the right to pass from one point to another. That is not exactly what is sought by the appellants. What they seek is not a right to pass along a pathway, but a right to pull away, or to cut away. An exclusive

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RECTOR, &c., OF ST. GABRIEL, FENCHURCH STREET *v.* CITY OF LONDON REAL PROPERTY CO.

Lord Penzance.

right of way through a churchyard is one which may be hardly known in the law; but a right of way between one point and another to be exercised by certain people is a familiar thing. If a question as to the right conferred should arise between the rector and churchwardens and the City of London Real Property Company, it would difficult to say what the legal measure of the right was. But the question here is whether this Court should interfere with the right granted by granting a faculty to the petitioners after what is authorized in the former faculty. I am of opinion that this Court ought not to interfere with the discretion the Court below has exercised in making the decree appealed from. The appeal must therefore be dismissed.

The respondents will have the costs of the appeal.

The question of the costs of the proceedings in the Court below will be dealt with in that Court.

Solicitor for appellants: *E. W. Oliver.*

Solicitor for petitioners in Court below: *L. J. B. Rawlins.*

Solicitors for respondents: *Tatham & Pym.*

C. F. J.

C. A.

1896

Feb. 19.

[IN THE COURT OF APPEAL.]

WILKINS *v.* WILKINS.

Divorce—Practice—Motion for New Trial—Enlargement of Time—Imposition of Terms—Divorce Suit—Supreme Court of Judicature Act, 1890 (53 *&* 54 *Vict. c.* 44), *s.* 1—*Rules of the Supreme Court, Order* LXIV., *r.* 7.

By virtue of the Supreme Court of Judicature Act, 1890, which provides that from and after October 24, 1890, every motion for a new trial, in any cause or matter in the High Court which has been tried with a jury, shall be heard and determined by the Court of Appeal, the practice with regard to a new trial of a divorce cause is regulated (not by the practice under the Matrimonial Causes Acts but) by the practice of the Court of Appeal, and consequently rule 7 of Order LXIV. of the Rules of the Supreme Court applies, and empowers the Court to grant an enlargement of the time within which to move for a new trial of the cause, and as a condition of so doing to impose terms on the party who makes the application.

In 1892 a wife petitioned for a judicial separation on the ground of her husband's adultery. The husband by his answer denied the adultery, and also alleged that, at the time of his marriage with the petitioner, she had a husband living. At the trial in January, 1895, the jury found on the evidence that the husband had committed adultery, and that at the time of the marriage the first husband was dead. A decree for judicial separation was made.

In September, 1895, the first husband (who had not been heard of since 1858) returned to England. In October, 1895, the second husband presented a petition for declaration of nullity of marriage. The wife pleaded the verdict and decree in the former suit as an estoppel. At the trial Gorell Barnes J. was satisfied of the identity of the man who had returned; but held that he could not make a decree of nullity while the verdict and decree in the first suit stood unimpeached. The second husband (with the leave of the Court of Appeal) moved in the first suit for an enlargement of the time within which to apply for a new trial:—

Held, that the application ought to be granted, but only on the terms of the applicant undertaking to secure the payment to the respondent during their joint lives of an allowance for her maintenance, the amount of which was fixed by the Court.

MOTION by the respondent to a petition in the Divorce Division for a judicial separation, asking for an enlargement of the time within which to apply for a new trial of the cause, the time limited by the Rules of the Supreme Court for so doing having expired.

The cause was tried by Jeune P. with a jury on January 18, 1895.

In February, 1854, George Rickard married Emma Ham at Plymouth. Rickard was a carpenter in the Royal Navy, and was employed on board the ship *Magicienne* then at Plymouth. He served on board that ship during the war between Great Britain and Russia, which commenced soon after the marriage, until the close of the war in 1856, and he then returned to England and lived with his wife. In 1857 he went to the West Indies in the ship *Indus*, to which he was then attached. After the ship arrived there he deserted, and in 1858 he returned to England and lived with his wife for a short time. He then went to the United States, and his wife never saw him or heard of him again until as hereinafter appears. On May 13, 1865—nearly seven years after Rickard went to America—his wife, believing him to be dead, went through the ceremony of marriage with John Wilkins. Wilkins was aware of the former marriage, but was informed by Emma Rickard that Rickard was dead. He knew, however, that there was no positive proof of Rickard's death. There were eight children of this marriage, but there were none of the first. In January, 1883, Wilkins and his wife separated by mutual consent, and thenceforth lived apart. A separation deed was executed on January 20, 1883, by which Wilkins covenanted with a trustee to make his wife an allowance of 12*s*. a week during their joint lives; and the trustee covenanted with Wilkins, and the wife agreed, that she would not take any proceedings against him for any further allowance by way of alimony beyond the provision thereby secured to her. In September, 1892, Mrs. Wilkins petitioned for a judicial separation on the ground of her husband's adultery. By his answer he denied the adultery, and also pleaded that at the time of his marriage George Rickard was living, and consequently the second marriage was a nullity. Mrs. Wilkins denied this allegation. In July, 1893, Wilkins filed a cross-petition for nullity of marriage. The two suits were consolidated, and came on for trial together before the President with a special jury on January 18, 1895. Ultimately the cross-petition was by leave withdrawn, and upon the wife's petition the jury found on the evidence that Wilkins had committed adultery, and that at the time of the second marriage Rickard was not alive. A decree for judicial separation was accordingly made.

In September, 1895, Wilkins received information that George Rickard had recently arrived in England. Wilkins satisfied himself that this information was true, and on October 20, 1895, he presented a second petition for nullity of marriage, on the ground that Rickard was alive at the date of the second marriage. Mrs. Wilkins filed an answer denying that Rickard was alive, or had been alive at the date of her marriage with Wilkins, and also pleading the verdict of the jury and the decree in the former suit as an estoppel. On January 14, 1896, the suit came on for trial before Gorell Barnes J. without a jury. The man who professed to be George Rickard was called and gave evidence, and two of his brothers were called to identify him. The learned judge was satisfied of the identity of George Rickard; but he felt a difficulty in making a decree of nullity by reason of the verdict and decree in the former suit, and he adjourned the consideration of the case in order that Wilkins might make this application to the Court of Appeal.

On an ex parte application on behalf of Wilkins the Court of Appeal gave leave to serve notice of the present motion.

At this time Wilkins carried on business as a master tailor and was earning a good income. Mrs. Wilkins was sixty-four years of age. Five of the children of the marriage were living. They were grown up and were earning their own living.

Inderwick, *Q.C.*, and *Bargrave Deane*, for the petitioner. It may perhaps be objected on behalf of the respondent that the time within which an application for a new trial in a divorce suit is to be made is fixed by statute (vide 20 & 21 Vict. c. 85, s. 9; 21 & 22 Vict. c. 108, s. 18; 23 & 24 Vict. c. 144, ss. 1, 2) and not by Rules of Court, and that consequently the Court has no power to extend the time. By virtue of s. 1 of the Supreme Court of Judicature Act, 1890 (53 & 54 Vict. c. 44), motions for new trials "in any cause or matter in the High Court" are to be heard and determined by the Court of Appeal. But by the Rules of the Supreme Court, Order LXVIII., r. 1, the rules do not apply to "proceedings for divorce or other matrimonial causes."

[LINDLEY L.J. Since the Act of 1890 motions for a new trial must be made in the Court of Appeal, and they are governed by the practice of that Court and by the Rules of the Supreme Court.

KAY L.J. Order LXIV., r. 7, provides that "a Court or a judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."]

If that rule applies the Court has power to enlarge the time here, and ample ground is shewn for the exercise of the power.

Bayford, *Q.C.*, *H. A. Forman*, and *F. O. Robinson*, for the respondent. In *Ahier* v. *Ahier* (1) it was held that an appeal against the refusal of a new trial in a divorce suit must be brought within the time fixed by s. 2 of 23 & 24 Vict. c. 144, but that decision was before the Act of 1890.

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(1) 10 P. D. 110.

[LINDLEY L.J. That makes all the difference.]

At any rate, if rule 7 of Order LXIV. applies, the granting an enlargement of the time is within the discretion of the Court, and the Court has power to impose terms upon the applicant. Having regard to all the circumstances of the present case, the Court should, as a condition of granting the application, require the petitioner to make a proper provision for the maintenance of the respondent. The petitioner is in the mercy of the Court. He is now earning a good income, and should be required to allow the respondent at least 100*l*. per annum during their joint lives. At any rate, he should continue the payment of 12*s*. a week provided by the separation deed.

[LINDLEY L.J. We are inclined to think that he should secure to the respondent 30*s*. a week as in the nature of permanent alimony.]

Inderwick, Q.C., in reply. The respondent contracted the second marriage with the full knowledge that there was no positive proof that her first husband was dead. The petitioner has brought up the children and sent them out in the world. The respondent, having entered into an agreement not to sue for alimony, could gain nothing by her suit for judicial separation, and the present petitioner had to pay the costs of it. There was no attempt to prove that he had been guilty of cruelty. If that had been proved, the Court could have granted her a divorce, and could then have set aside the separation deed. It does not follow that, because the second marriage is void, the separation deed is at an end. The petitioner is willing to continue the payment of 12*s*. a week, and it is submitted that he ought not to be compelled to pay more.

LINDLEY L.J. The point of law which arises in this case is governed by the Supreme Court of Judicature Act, 1890. That Act has materially altered the practice with regard to motions for new trials. All motions for new trials have now to be made in the Court of Appeal, and that Court has to decide whether a new trial shall or shall not be allowed. The practice is governed by the Rules of the Supreme Court which apply to proceedings in the Court of Appeal. By Order LXIV., r. 7, we have power to enlarge the time for taking any proceeding in this court "upon such terms (if any) as the justice of the case may require, and the enlargement may be ordered although the application for the same is made after the expiration of the time appointed." It is obvious that under the peculiar circumstances of the case the present application ought to be granted on some terms or other. There must be some mode of getting rid of the difficulty which is created by the verdict and the decree in the first suit, and the proper mode is a new trial of that suit.

Then, what terms ought we to impose upon the applicant? All the members of the Court are impressed with the extreme hardship which would be inflicted on the respondent by our granting the application without imposing some terms upon the applicant. It would, I think, be very inhuman if after she had lived with him for eighteen years in the belief that she was his lawful wife and has borne him eight children, she should now be cast adrift without any means of support. The applicant's counsel says that he is willing to undertake to continue making the payment to the respondent of the 12*s.* a week which is provided by the separation deed. But the circumstances have materially altered since that deed was executed. The respondent was then much younger than she is now, and was able to do something to earn her own living. She is now sixty-four years of age and cannot do much for her own support. We think that 12*s.* a week is not now an adequate allowance for her maintenance, and we shall decline to grant an enlargement of the time unless the applicant will undertake to secure to the respondent an allowance of 1*l.* per week (including the 12*s.*) during their joint lives. If he gives that undertaking, we will enlarge the time, but not otherwise.

LOPES L.J. I am of the same opinion. There can be no doubt that the Court has power to enlarge the time, nor have I any doubt that under the very peculiar circumstances of the present case the enlargement ought to be granted. But I am

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clearly of opinion that the indulgence ought to be granted only upon terms. The question is, whether the payment of 12*s.* a week is under present circumstances sufficient. The circumstances have very much changed since the deed of 1883 was executed. The respondent is now much older than she then was, and, under the present circumstances, I think the 12*s.* a week is not a sufficient allowance. I agree that 1*l.* a week is the proper sum to be secured to her.

KAY L.J. The question of practice arises entirely under the Act of 1890. The practice which applies must be that of the Court of Appeal, for motions for new trials are now to be made in that court. The practice as to applications for the enlargement of the time for taking any proceeding is governed by rule 7 of Order LXIV., which gives the Court power to enlarge the time for taking any proceeding "upon such terms (if any) as the justice of the case may require." In my opinion this is a proper case for enlarging the time upon some terms. Both parties are now agreed that the identity of the man who professes to be the first husband has been proved; he is living, and he was produced in court at the trial of the second suit. The verdict of the jury at the trial of the first suit a year ago found erroneously that he was dead at the time of the second marriage. There is no laches on the part of the present applicant. He has recently ascertained by means of evidence which could not have been adduced at the former trial that the first husband was living at the time of the second marriage. It is said that the applicant is estopped by the former verdict and decree from proving this fact. But, as evidence is now forthcoming which could not by the exercise of reasonable diligence have been obtained at the first trial, there must be some mode of getting over an estoppel arising from a verdict which was obtained under a misapprehension of the real facts. In my opinion we have jurisdiction to enlarge the time for moving for a new trial of the first suit, and I am also clearly of opinion that the case is one in which the jurisdiction ought to be exercised. But I think it is equally clear that, in accordance with rule 7 of Order LXIV., some terms ought to be imposed on the applicant. What ought the terms to be? The applicant went through the ceremony of marriage with the respondent knowing that she had been married before, and knowing also that there was no positive proof of her husband's death. He married her on the chance of the first husband being dead. He now wishes to have his marriage declared a nullity, in order, I suppose, that he may be able to marry again. He has intimated that he shall probably attempt to impeach the validity of the separation deed of 1883. We cannot allow him now to cast this woman upon the world without making some provision for her support in the nature of permanent alimony. Looking at all the facts of the case, I think that 1*l.* a week is a proper provision for her, and the applicant ought not to be allowed the enlargement of time for which he asks, except upon the terms of undertaking to secure to the respondent a payment of 1*l.* a week during their joint lives.

LINDLEY L.J. The applicant must pay the costs of this application.

Inderwick, Q.C. My client is prepared to give the undertaking which the Court requires.

LINDLEY L.J. The undertaking should be embodied in the order.

It was then by consent ordered that the verdict and the decree in the first suit should be set aside.

Upon a subsequent application to GORELL BARNES J. a decree of nullity of marriage was made in the second suit.

Solicitors: *Lewis & Lewis; Edwin Hughes.*

W. L. C.

1896
Feb. 18.

CULLING *v.* CULLING AND NICHOLSON.

Marriage—Validity—Solemnization by Clergyman of the Established Church on board a British Warship without Licence or Banns—Subsequent Adultery—Dissolution of Marriage.

A marriage between British subjects, solemnized on board an English man-of-war at a foreign station by a clergyman of the Established Church without licence or banns, is valid.

The petitioner, an officer in Her Majesty's army, was married in 1884 to the respondent, also a British subject, on board one of Her Majesty's ships, then lying at Limasol, in Cyprus, where the petitioner was stationed. The ceremony was performed by the chaplain of the vessel, a clergyman of the Established Church. There had been no publication of banns, and no licence had been obtained:—

Held, that there had been a valid marriage according to the common law of this country, and that, upon proof of the respondent's adultery, the petitioner was entitled to a decree nisi for dissolution of the marriage.

PETITION by John Chislett Culling, a surgeon-major in Her Majesty's army, for dissolution of his marriage on the ground of the wife's adultery.

The petitioner and respondent were both members of the Church of England, and on October 5, 1884, they went through the ceremony of marriage, according to the rites of their Church, on board H.M.S. *Alexandra*, then lying at or off Limasol, in the island of Cyprus, where the petitioner was at the time stationed.

The ceremony was performed by the chaplain of the vessel, the captain being also present.

No publication of banns, nor any other public notice, preceded the solemnization of the marriage; and no licence for the marriage had been granted. After the marriage the petitioner and respondent cohabited at various places, and one child, issue of the marriage, was born in 1885.

After the spring of 1893 the petitioner and respondent ceased to cohabit; and on April 6, 1894, the former instituted the present proceedings.

The petitioner on being called proved, inter alia, the facts regarding the ceremony of marriage, and a certified copy of a certificate, which had been obtained from the Registrar-General at Somerset House, was put in. It was in form very similar to the copy of ordinary marriage certificates obtainable at Somerset House, but it was not stamped. It appeared that a separate register was kept of such marriages as the present one, and that this register was compiled from information supplied to the Registrar-General's Department by the War Office, to whom a notification of such marriages was forwarded from the place where they were solemnized.

Temple Franks, for the respondent, and *Inderwick, Q.C.*, and *Barnard*, for the co-respondent, did not dispute the evidence as to adultery, and took no part in the proceedings.

Bargrave Deane, for the petitioner. The question of these marriages was discussed in *Reg.* v. *Millis* (1), in which case the Peers were equally divided. That case established the principle that by the common law such a marriage, if solemnized between British subjects in the presence of a clergyman of the Church of England, would be valid. In that case the marriage was held to be invalid because the ceremony was performed by a Presbyterian minister, while both the contracting parties were members of the Church of England. The view entertained by all the judges who were called in to assist the Peers in arriving at a decision in that case was that the marriage was invalid because it was not solemnized by a clergyman of the Church of England. *Catherwood* v. *Caslon* (2) is a more recent case, and there, also, the marriage was held invalid because it was not solemnized in the presence of a clergyman of the Church of England. After that date an Act (42 & 43 Vict. c. 29) was passed validating certain marriages previously solemnized, which under that judgment would have been held to be illegal. In regard, however, to marriages solemnized in the presence of a clergyman of the Church of England, the common law was left unaltered.

SIR F. H. JEUNE, PRESIDENT. I am satisfied that this was a valid marriage. The judgment of Parke B. in *Catherwood*

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(1) 10 Cl. & F. 534.

(2) 13 M. & W. 261.

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CULLING v. CULLING.

The President.

v. *Caslon* (1) put the effect of the decision in *Reg.* v. *Millis* (2) very clearly, and it amounts to this—that a ceremony of marriage, solemnized under such circumstances in the presence of a clergyman of the Church of England, is a valid marriage. That being so, and the adultery of the respondent with the co-respondent being proved and not disputed, I pronounce a decree nisi, with costs against the co-respondent.

Solicitors for petitioner: *Brown, Ringrose & Lightbody.*
Solicitors for respondent: *Lewis & Lewis.*
Solicitors for co-respondent: *Soames, Edwards & Jones.*

[Reported by H. Durley Grazebrook, Esq.]

C. A.

1896

March 4.

[IN THE COURT OF APPEAL.]

LANCASTER *v.* LANCASTER.

Divorce—Practice—Judicial Separation—Agreement for Settlement of Suit—Separation Deed—Costs.

The parties to a wife's suit for judicial separation entered into an agreement for the settlement of it, which provided (inter alia) that a separation deed should be executed; that the husband should pay the wife's taxed "costs of suit"; and that the agreement might be made a rule of Court:—

Held, that the costs of and incident to the preparation and settlement of the deed were not "costs of suit" which the husband was bound to pay.

Decision of Jeune P. (ante, p. 75) affirmed.

APPEAL by the petitioner (the wife) in a suit for judicial separation against a decision of the President. (3)

The suit was compromised upon terms which were embodied in an agreement, dated November 1, 1894, and signed by the parties to the suit and their counsel.

The agreement is stated in full in the former report. It contained (inter alia) the following provisions:—

"A deed of separation to be entered into with all usual clauses, to be settled by Mr. Bayford.

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(1) 13 M. & W. 261.

(2) 10 Cl. & F. 534.

(3) Ante, p. 75.

"Mr. Lancaster is to pay Mrs. Lancaster's costs of suit, to be taxed by Mr. Registrar Hannen in case of difference.

"These terms may be made a rule of Court."

The terms were made a rule of Court. The deed was prepared and executed, and the petition was then dismissed.

Upon the taxation of the wife's costs, the registrar refused to allow the costs relating to the preparation, settling and stamping of the deed. Jeune P. affirmed the decision of the registrar.

The wife appealed.

Sir E. Clarke, Q.C., and *Bargrave Deane*, for the wife. The costs in question are "costs of suit." The agreement was a compromise of the suit. The suit was still in the Court, and the agreement was a step in the suit. The suit did not come to an end and was not dismissed until the deed had been executed. The wife obtained the separation which she desired, though not actually by an order of the Court. But, the terms having been made a rule of Court, they become virtually an order of the Court.

Ingle Joyce, and *Barnard*, for the husband, were not called upon.

LINDLEY L.J. In my opinion we cannot grant this application. The expression "costs of suit" is a technical one. It is well understood by the taxing masters and by everyone who is familiar with the practice of the Court, and I think we ought not to stretch its meaning. The true ground of the decision is, I think, to be found in the last sentence of the judgment of the learned President, where he said: "the costs of settling the deed are costs which the parties might have provided for by agreement, but have not." It would be a bad precedent if we were to allow these costs. The appeal must be dismissed.

KAY L.J. I agree, and for the same reasons. If the parties intended that these costs should be included under "costs of suit," they should have added some such words as these: "including all her costs of and incident to the compromise."

If they had done this, the costs of and incident to the preparation and settlement of the separation deed would have been included; but, in the absence of such words, it would be a very strong thing to say that those costs are "costs of suit."

A. L. SMITH L.J. concurred.

Appeal dismissed.

Solicitors: *Leggatt, Rubinstein & Co.; Greig, Meikle & Briggs.*

W. L. C.

1896
Jan. 16, 17;
Feb. 5.

THE SOLWAY PRINCE.

Admiralty—Salvage—Service rendered under a Contract for work and labour with third Parties.

The plaintiffs, with the knowledge and assent of her owners, undertook to lift a sunken vessel, under a contract with the insurers, who advanced to the plaintiffs before the work commenced 40 per cent. of the amount for which the vessel was insured. The vessel was successfully raised, but the operation of lifting proved more costly than was anticipated, and some of the underwriters in the meantime became insolvent. In an action of salvage brought by the plaintiffs against the defendants as owners of the vessel:—

Held, by Sir F. H. Jeune, President, that the contract with the underwriters, which was not dependent on success, precluded the plaintiffs from asserting a maritime lien on the vessel, and claiming salvage remuneration from her owners.

ACTION OF SALVAGE. The plaintiffs were the Liverpool Salvage Association, a body of underwriters and shipowners, incorporated under the Companies Acts, and associated for the purpose of diminishing the loss, damages, and expenses which may arise from maritime casualties, and for the promotion of despatch and economy in the salving of ships and their cargoes, and generally for the protection of the interests of the owners of, and underwriters upon, ships cargoes and freight. For these purposes the association employs a staff of surveyors, divers, and others, with the necessary plant, and the expenses are charged against those who employ the association together with an office fee by way of commission. The defendants were the owners of the *Solway Prince*, and the main question

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for decision was, whether the plaintiffs could claim in rem for salvage services rendered to the vessel, or whether they were precluded from making the claim by reason of a contract for work and labour with the underwriters on the vessel.

The material facts were :—

On August 15, 1895, the *Solway Prince*, an iron screw steamship of 349 tons gross, and ninety-nine tons net, register, from Briton Ferry to Belfast with 340 tons of coal, struck a rock at Tara Point, County Down, Ireland, and shortly afterwards sank.

The vessel was at the time insured with the Maritime Insurance Company of Liverpool for 500*l.*, the General Insurance Company of Trieste for 500*l.*, the Bavarian Lloyds for 500*l.*, and the Shipowners Syndicate (Re-assured) for 3500*l.*, total 5000*l.*; and the plaintiffs communicated with the Liverpool and London underwriters on the ship, and with the agents of her owners, and obtained their sanction to send an official to report on the wreck. The vessel was found to be lying in an exposed position with twenty-two feet of water above the main deck at low water, but, as it was not anticipated that she was seriously damaged, and having regard to the nature of the ground, it was thought that she could be lifted by pontoons in a week at a cost of about 2000*l.* By August 23 all the underwriters had agreed to the plaintiffs proceeding with the operation of lifting, and as money on account was wanted, about 40 per cent. on the insured value was advanced, 200*l.* being paid direct to the plaintiffs by the Bavarian Lloyds, and 1780*l.*, subsequently collected from the other underwriters and paid to the plaintiffs by the brokers who acted as agents for the owners of the vessel in their insurances.

Owing to bad weather, and to the vessel embedding herself in the sand, considerable delay occurred, involving expense which was increased by the vessel proving to be more seriously damaged than was expected; but the underwriters, and the owners' agent on the spot, were kept duly advised of the operations, and on September 24 the *Solway Prince* was refloated. She was towed to Belfast where she was safely docked on the 27th, her value then being 2500*l.* The vessel was there temporarily repaired by the plaintiffs sufficiently to be taken to

Liverpool where she was repaired at a cost of 1925*l*. (1) After the repairs were completed the vessel was taken over by her owners, and on November 28, as some of the underwriters had, in the meantime, proved to be insolvent, the writ in the present action was issued.

By their statement of claim, the plaintiffs alleged that by their services the *Solway Prince* had been saved from total loss, and they claimed such an amount of salvage as to the Court might seem just, together with all expenses properly incurred, or, in the alternative, on an alleged agreement to be implied from the conduct of the parties that "in consideration of the salvage services the defendants would pay to the plaintiffs all charges and expenses incurred by them in rendering the services together with a reasonable remuneration for their services as salvors."

The particulars delivered under the alternative claim shewed disbursements to the extent of 4518*l*. 3*s*. 8*d*., to which was added an office fee of 210*l*.; commission on disbursements, on cash advanced, and fee for agency and expenses, 63*l*. 5*s*. 3*d*.; making a total of 4791*l*. 8*s*. 11*d*.; against which credit was given for 2145*l*. 8*s*. 5*d*. (made up of sale of cargo, coal, 48*l*. 8*s*. 5*d*.; sundries, 117*l*.; cash received from insurance companies, 1980*l*.), leaving a balance alleged to be due of 2646*l*. 0*s*. 6*d*.

By their defence the owners of the *Solway Prince* denied that the alleged services were rendered at their request, or that they were salvage services, and, by paragraph 4, said that "the alleged services were rendered by the plaintiffs (if at all) under and pursuant to an employment of the plaintiffs in that behalf by the underwriters upon the said vessel or some of them and not otherwise and for reward to be paid to the plaintiffs by these underwriters . . . ." To the alternative claim the defendants pleaded a denial of any such agreement, and, by paragraph 9, said that "if the defendants, or if the said vessel were or was ever in any way liable to pay to the plaintiffs any part of their claim, that liability was satisfied and discharged by the payment

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(1) The cost of these repairs formed the subject of a separate action in the Queen's Bench Division by the repairers against the owners of the vessel.

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to the plaintiffs of sums amounting to 2000*l.*, or thereabouts, by underwriters on the vessel."

On behalf of the plaintiffs it was admitted at the hearing that a binding authority had been obtained from the underwriters; but it was contended that the work was done throughout for the owners of the vessel, though, as the owners would look to the underwriters to reimburse them under the suing and labouring clause in the policies for the expenses incurred, it was desirable that, in the event of the attempt to raise the vessel proving unsuccessful, nothing should be done without the knowledge and assent of the underwriters, so as to prevent objection being taken by them afterwards that the expenses ought never to have been incurred; and, further, that it was in accordance with usage for the underwriters to advance a percentage of that for which they would be ultimately liable.

After hearing the evidence, consisting mainly of correspondence between the agents of the plaintiffs and of the underwriters and of the owners of the vessel, the learned judge held that there was no evidence of any express or implied contract between the defendants and the plaintiffs, but that the correspondence did shew a distinct contract by the underwriters for the employment of the plaintiffs. The case subsequently proceeded, apart from any question of agreement, on the claim by the plaintiffs in rem against the defendants, as the owners of the ship, for salvage.

Joseph Walton, Q.C., and *Alexander D. Bateson*, for the plaintiffs.

Sir Walter Phillimore, and *T. G. Carver*, for the defendants.

The arguments of counsel on the question of salvage fully appear from the judgment. In addition to the cases there mentioned, the following were referred to:—

For the plaintiffs: Kennedy on Salvage, pp. 3, 25, 198; *The William Lushington* (1); *The Pickwick* (2); *The William Symington* (3); *The Boiler ex Elephant* (4); Merchant Shipping

(1) 7 Notes of Cases, 361.

(2) 16 Jur. 669.

(3) *Shipping Gazette*, May 17, 1890.

(4) W. N. (1891) 52.

Act, 1854 (17 & 18 Vict. c. 104), s. 458; Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 510, 546. For the defendants: *The Erato* (1); *The Rasche* (2); *The Reliance* (3); *The Jubilee* (4); *The Jonge Bastiaan* (5); *The City of Chester* (6); *The De Bay* (7); *The Kate B. Jones* (8); *The Benlarig* (9); *The Aquila* (10); *Morgan* v. "*The Castlegate.*" (11)

Cur. adv. vult.

Feb. 5. SIR F. H. JEUNE, PRESIDENT. [After stating the nature of the claim, the learned judge proceeded:—] The *Solway Prince* was sunk at Tara Point, in Ireland, and with the knowledge and assent of the defendants, the plaintiffs were employed by the insurers of the vessel to raise, or endeavour to raise, her, on the terms of being paid their expenses, and what was termed an office fee, which is apparently calculated as a commission on such expenses. The plaintiffs did successfully raise and temporarily repair the vessel, incurring, as they allege, the expenses specified in their particulars. Before the work was commenced the insurers paid to the plaintiffs in respect of it the sum of 2000*l.*, or thereabouts. The value of the *Solway Prince* after being raised was about 2500*l.* After the vessel was raised it was found that some of the insurers were unable to pay the full amount due from them, and in consequence the plaintiffs have been, and no doubt will be, unable to recover from the insurers the full amount of the sum they contracted to be paid. In consequence this action is brought substantially in order to make the owners liable in respect of the balance of the sum alleged to be due from the insurers.

I have already found on the correspondence and the other acts of the case that there was no contract between the plaintiffs and the defendants, and that the plaintiffs cannot recover anything from the defendants as for work and labour done. It remains to be considered whether they can recover anything as salvage.

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(1) 13 P. D. 163.
(2) L. R. 4 A. & E. 127.
(3) 2 Hagg. 90, note.
(4) 3 Hagg. 43, note.
(5) 5 C. Rob. 322.
(6) 9 P. D. 182, at p. 199.
(7) 8 App. Cas. 559.
(8) [1892] P. 366.
(9) 14 P. D. 3.
(10) 1 C. Rob. 37.
(11) [1893] A. C. 38.

It was contended before me for the plaintiffs that this was, in fact, a salvage service, and that as the plaintiffs have not been fully paid, they are entitled to assert a maritime lien on the vessel, and claim a salvage remuneration, and that the sum received may be allocated in part for the repairs, and as to the residue, for expenses which may be excluded in the computation of salvage. It was then urged that half, two-thirds, or even more of the value of the vessel should be awarded to the plaintiffs as salvors.

The answers to these contentions are three-fold: First, that the plaintiffs have been paid about 2000*l.*, that is to say, more than is, according to the practice of the Court, ever awarded as salvage, having regard to the value of the res; secondly, that if it be a case of salvage it is the insurers who were really the salvors and not the plaintiffs, who were only employed by them; and, thirdly, that the contract between the insurers and the plaintiffs was a pre-existing contract of such a character as, according to the authorities, to deprive the persons rendering the services of the right to claim as salvors.

During the argument the real question seemed, as it still seems to me, to be: Can the plaintiffs be regarded as salvors, although employed by the insurers to do the work which they performed under an ordinary contract at common law for which the remuneration was not to depend on success? If their contract with the insurers does not deprive them of the right to claim as salvors, it appeared to me that the fact of their employing various persons to do the actual work was not, according to the principles laid down in *The Purissima Concepcion* (1), and *The Cargo ex Honor* (2), fatal to their claim as salvors, and that by appropriating the sum received by them from the insurers to matters outside their claim as salvors they have an answer to the contention that they are already paid in full. During the argument I doubted whether the plaintiffs should not be considered as having acted in a dual capacity, that is to say, both as salvors and as contractors with the insurers. But on reflection I have come to the conclusion that the latter capacity excludes the former, and that the plaintiffs are not, and never were, salvors, because they were employed by the insurers under an ordinary, and not a salvage contract, to do all they did do, on the terms of receiving a specified reward.

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(1) 3 W. Rob. 181.

(2) L. R. 1 A. & E. 87.

I think this must be so on principle. There need not, of course, in some cases of salvage, such as those of the rescue of a derelict, be any actual assent of the owner of the res or his servants to his property being saved—that is the characteristic difference between the legal consequences of the preservation of property by land and of some property at sea. But it appears to me impossible that the property of any owner can be salved without his sanction, express or implied, in any case in which anything that is done is done with his knowledge; and that when, as here, the owner has merely allowed some one else to employ persons to endeavour to rescue his property on the terms of being paid for their work and labour, such a sanction is certainly not expressed, and cannot be implied. If the owner made such a contract with such persons himself, provided there be no change in the nature of the service, and it may perhaps be necessary to add, provided that the transaction is not shewn to have been inequitable (here there is no question of any such change or want of equity), I think that there can be no doubt that the contracting parties could not claim a remuneration on salvage principles. Nor do I think it makes any difference if the contract is, to the knowledge and with the assent of the owners, made not with themselves but with third parties. Again, which is substantially one of the arguments advanced on behalf of the defendants before me, if the contract of the plaintiffs with the insurers does not prevent their claiming as salvors, why should not any one of the persons employed by them also claim? But can it be supposed that any one of the servants or workmen engaged—a diver, for example, employed at his usual rate of wages—has, if the wreck be raised, a meritorious claim against the owner as a salvor?

Again, which is another way of putting the same considerations, the plaintiffs are really trying to make the owners liable,

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because the insurers, with whom they contracted, are not able to pay them in full. It was admitted that, had the insurers fulfilled their contract, there could have been no claim against the defendants. But it appears to me impossible to treat the defendants as in any sense guaranteeing the insurers' solvency.

There is not, so far as I know, any direct authority in the Court of Admiralty on the point, unless it is to be found in those cases which decide that persons who perform services in themselves of a salvage nature, because they are bound by a pre-existing contract or a pre-existing duty to perform them, are not entitled to claim as salvors: see *The Neptune* (1) and *The Hannibal.* (2)

It was argued for the plaintiffs that those authorities do not conclude the present case, because in them the previous employment or duty is admittedly considered to impose the performance of the duties actually performed, should the necessity for them arise, but in the present instance the very question is whether the employment as a contractor does or does not exclude the assumption of the position of a salvor. But these authorities at least illustrate the voluntary character which is held to be essential to the claim of a salvor, and they shew that if work be done in pursuance of a contract other than a salvage contract, it does not, under ordinary circumstances, give rise to a salvage claim.

In a case in the common law courts—*Castellain* v. *Thompson* (3)—the circumstances resembled those in this case. There the owners of certain copper ore employed Messrs. Thompson & Co. to convey it in barges from Liverpool to Birkenhead, and to deliver it there to Mr. Lewis, he agreeing to indemnify the owners against all risk of transit. The barge was sunk without any fault of Messrs. Thompson. They informed the owners of the accident, and requested to be employed to raise the ore. The owners referred them to Mr. Lewis, and Mr. Lewis referred them to his insurers, who employed them to raise the ore. Having done so, they claimed a lien against the owners for the expense of raising it, and the owners brought an action against them for detaining the ore. The main point decided in the case was that the owners were not estopped from claiming the ore by having held out any one else as the true owner; but it was also held that Messrs. Thompson had no lien on the ore on the grounds of general average loss or of salvage. It was, indeed, argued that there could be no lien in respect of merely raising the ore, but Erle C.J. expressly declined to decide this. The learned Chief Justice negatived the right to a lien—that is, a possessory lien—on the ground that the insurers who made the contract were not held out by the real owners as the owners of the ore, but he then added that no claim for salvage could be sustained; and, if once it is assumed that the raising of the ore may in its nature be a salvage service, there would be an answer to an action for detention of the ore, unless it be considered that the common law contract to endeavour to raise the ore for reward excludes the contractors from the assumption of the character of salvors.

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(1) 1 Hagg. 227.

(2) L. R. 2 A. & E. 53.

(3) 32 L. J. (C.P.) 79.

In the case of *Aitchison* v. *Lohre* (1) Lord Blackburn, when considering the question whether general average or salvage came within the suing and labouring clauses of a policy, appears to have had no doubt that the employment by the assured of persons to render services on the terms of a common law contract, excluded a right to claim as salvors. "In some cases," his Lordship said, "the agents of the assured hire persons to render services on the terms that they shall be paid for their work and labour, and thus obviate the necessity of incurring the much heavier charge which would be incurred if the same services were rendered by salvors, who are to be paid nothing in case of failure, and a large remuneration proportional to the value of what is saved in the event of success." I can see no reason why employment by the insurers should in this respect be different from employment by the insured.

Contracts such as that in the present case must be common —indeed, I understand that the plaintiff association frequently makes them. There would, I think, be more authority on the subject if claims for salvage had ever been successfully asserted under such circumstances.

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(1) 4 App. Cas. 755, at p. 765.

Judgment for defendants.

Solicitors for plaintiffs: *Batesons, Warr & Wimshurst, Liverpool.*

Solicitors for defendants: *Hill, Dickinson & Co., Liverpool.*

T. L. M.

IN THE GOODS OF REID.

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Feb. 24.

Probate—Chain of Executorship—Executor of Executor—Disappearance of Executor to whom Power to Prove reserved—Citation by Advertisement.

Probate of a will was granted to one of two executors, power being reserved to make the like grant to the other executor. The acting executor died, not having fully administered; at the date of his death the other executor had not been heard of for fourteen years. The daughter and sole next of kin of the testator, with the assent of the executors of the acting executor, moved for a grant to herself of letters of administration de bonis non:—

Held, that the grant could not be made, as, upon the non-appearance to a citation of the executor to whom power to prove had been reserved, the chain of executorship would be continued in the executors of the acting executor without any fresh grant from the Court. Leave given to effect service of the citation on the absent executor by advertisement.

In the Goods of Noddings (2 Sw. & Tr. 15, as amended by the corrigenda in that volume) followed.

MOTION on behalf of Louisa Reid for—(*a*) grant to her of letters of administration de bonis non with the will and codicils annexed of T. B. Reid, deceased, without citing F. W. Herbert, to whom power to prove the will had been reserved; or (*b*) in the alternative, that service of the citation might be effected on the said F. W. Herbert by advertisement to the satisfaction of the registrar, and that if no appearance should be entered thereto the said grant should issue to the applicant.

The applicant was the daughter and sole next of kin of the testator, who died on January 11, 1894. On March 13, 1894, probate of the will and codicils was granted to Allan Fielding, one of the surviving executors named in the will, power being

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reserved of making the like grant to F. W. Herbert, the other surviving executor. On March 8, 1895, Allan Fielding died, and on May 17 probate of his will was granted to the executors named therein. The said F. W. Herbert had not been heard of for fourteen years, and inquiries to discover his whereabouts had been made without success. The executors of Allan Fielding had never intermeddled with the estate of the testator, and had given to the applicant a written consent to the grant to her for which she now applied.

Bargrave Deane, for the applicant. The grant may properly be made to the testator's daughter and sole next of kin. Assuming Herbert to be the surviving executor, if he is cited and does not appear, the executors of Fielding, the acting executor, are the representatives of the testator, and a grant of letters of administration would be made to them: *In the Goods of Noddings.* (1) They have not intermeddled with the estate, and consent to the grant going to the applicant instead of to themselves.

GORELL BARNES J. The first branch of this application must clearly be refused. If Herbert had died before the testator or before Fielding, the latter would be the surviving executor of the testator's will; but if Herbert is the survivor, he must be cleared off by citation, and when he is cleared off the representation to the testator will remain in Fielding's executors without any order of the Court. This is clear on a perusal of *In the Goods of Noddings.* (1) It is true that at p. 17 the language of the judgment apparently makes a grant necessary, the learned judge being reported to have said, "the executor of the acting executor seems to be the proper representative of the original testator, when the surviving executor of the testator has been cited and does not appear, and the grant will be made accordingly." But on looking at the errata at the beginning of the volume, and the corrigenda inserted opposite p. 441, it is plain that the last words should not have been inserted in the judgment, that no fresh grant was needed, and that none was in fact made. This decision, as amended in the errata and corrigenda, I unhesitatingly follow, and must refuse the application for a grant to the applicant. So much of the application as asks for leave to effect service of the citation on Herbert by advertisement will be granted.

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(1) 2 Sw. & Tr. 15.

Solicitors: *Speechly, Mumford, Landon & Rodgers.*

W. J. B.

SWOFFER *v.* SWOFFER.

1896
March 3.

Husband and Wife—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *s.* 11—*Appeals—Practice.*

Upon an appeal to the Probate, Divorce and Admiralty Division from the decision of a court of summary jurisdiction under the Summary Jurisdiction (Married Women) Act, 1895, the practice under the Divorce Acts has no application, and it is not necessary that any case should be stated or filed. The practice on such appeals is governed by Order LIX., rr. 4A, 7, 8, 10, 11, 12, and 16.

APPEAL from the order of a metropolitan police magistrate, made under the provisions of the Summary Jurisdiction (Married Women) Act, 1895, by which the appellant had been ordered to pay a weekly sum to his wife.

The appellant in person objected to the amount of the allowance as excessive, regard being had to his means.

Randolph, for the respondent. There is a preliminary objection to the hearing of the appeal. The notice of appeal is bad; it is not an eight days' notice, and no grounds of appeal are specified. No rules of practice have been made under the Act, and the rules as to appeals under s. 4 of the Matrimonial Causes Act, 1878, are therefore applicable. (1) The rule dealing with appeals under that Act is Order LIX., r. 4A, which makes rr. 7,

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(1) By s. 11 of the Act of 1895 an appeal lies from a court of summary jurisdiction to the Probate, Divorce and Admiralty Division. "Rules of Court may from time to time be made regulating the practice and procedure in such appeals. And, until altered or repealed, any rules already made as to appeals under s. 4 of the Matrimonial Causes Act, 1878, shall apply to appeals under this Act."

8, 10, 11, 12, and 16 of Order LIX. applicable to them. Rule 10 provides in terms that the notice of motion must be an eight days' notice and must state the grounds of appeal.

SIR F. H. JEUNE, PRESIDENT. This being one of the first appeals under the Act, the Court will certainly exercise its powers of amendment under Order LIX., r. 16, and hear the appeal on the merits. It appears that in the present appeal there has been a confusion as to the practice. Among other things, a case has been filed with the registrar. This is unnecessary. It should be known that these appeals are not appeals under the Divorce Acts, and that the practice under those Acts has no application to them. Unless and until special rules are made regulating the practice in these appeals, the practice in appeals under s. 4 of the Matrimonial Causes Act, 1878, will apply to them; that is to say, they will be governed by Order LIX., rr. 4A, 7, 8, 10, 11, 12, and 16, and those rules will be the only practice applicable.

GORELL BARNES J. concurred.

[The appeal was then heard on the merits, and the order varied as to the amount, the Court remarking that, while in cases where there was sufficient evidence of the husband's earnings before the Court below it would be extremely unwise to interfere with their determination, in the present case there were not sufficient materials to justify the amount of the allowance, the only evidence of the appellant's earnings being that of the appellant himself, which shewed that the amount was too large.]

Solicitor for respondent: *T. Duerdin Dutton.*

W. J. B.

LANE *v.* LANE.

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March 3.

Husband and Wife—Persistent Cruelty—Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 39), *s.* 4—*Retrospective operation of Section.*

The provision of s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, giving jurisdiction under the Act to a court of summary jurisdiction in cases where a husband has been guilty of persistent cruelty to his wife, thereby causing her to live apart from him, is retrospective in its operation, and applies to acts of cruelty committed before the Act came into force.

Appeal from the decision of justices of Glamorganshire refusing to make an order under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, on the ground of want of jurisdiction. (1) The application to justices had been made by the appellant, a married woman, on the ground that her husband, the respondent, had been guilty of persistent cruelty to her, and by such cruelty had caused her to live apart from him. At the hearing it appeared that the acts of cruelty relied upon, which were spread over a period of twelve months, had been committed before January 1, 1896, the day on which the Act came into force; and the justices, being of opinion that the section was not retrospective in its operation, but applied only to acts of persistent cruelty committed after the Act came into force, held that they had no jurisdiction, and refused to make an order.

S. T. Evans, for the appellant. The section is retrospective,

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(1) By 58 & 59 Vict. c. 39, s. 4, "Any married woman whose husband shall have been convicted summarily of an aggravated assault upon her within the meaning of s. 43 of the Offences against the Person Act, 1861, or whose husband shall have been convicted upon indictment of an assault upon her, and sentenced to pay a fine of more than five pounds or to a term of imprisonment exceeding two months, or whose husband shall have deserted her, or whose husband shall have been guilty of persistent cruelty to her, or wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain, and shall by such cruelty or neglect have caused her to leave and live separately and apart from him, may apply to any court of summary jurisdiction" . . . . for an order or orders under the Act.

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and applies to cases of persistent cruelty before the Act. The question is really concluded by authority. In *Reg.* v. *Birwistle* (1) it was held that the provision of 49 & 50 Vict. c. 52, s. 1, enabling justices to make a maintenance order in the case of any married woman who " shall have been " deserted by her husband, was retrospective; Lord Coleridge C.J. observing during the argument, " Scores of Acts are retrospective, and may without express words be taken to be retrospective, since they are passed to supply a cure to an existing evil." It is important to observe that the language of that section, like that of the section now under discussion, is in the future perfect tense: " shall have been." Under s. 34 of the Divided Parishes Act, 1876, which conferred a settlement upon a person who "shall have resided" for three years in any parish under such circumstances as would render him irremoveable, it was held that residence before the Act was sufficient to satisfy the expression "shall have resided": *Reg.* v. *Brampton Union.* (2) And in *Reg.* v. *Vine* (3) the language of s. 14 of the Wine and Beerhouse Act Amendment Act, 1870, which disqualified " every person convicted of felony" from selling spirits by retail, was also held to be retrospective. [He was stopped by the Court.]

Ivor Bowen, for the respondent. The justices were right. The section deals with five cases, which are wholly disjunctive, and must be considered apart from each other: (1.) summary conviction for an aggravated assault; (2.) conviction on indictment for an assault; (3.) desertion; (4.) persistent cruelty; and (5.) wilful neglect to provide reasonable maintenance. In all these cases, except that of persistent cruelty, there was a remedy before the Act came into force; as regards persistent cruelty the Act creates a new offence triable in a court of summary jurisdiction, and introduces a new remedy. "Persistent cruelty" implies a continuing offence, and there was no such continuing offence before the Act; and even if there was a remedy by judicial separation in this court, there is an entirely new remedy provided by the Act. Moreover, s. 9, which provides that payment of a sum of money directed to be

(1) 58 L. J. (M.C.) 158.

(2) 3 Q. B. D. 479.

(3) L. R. 10 Q. B. 195.

paid by an order under the Act may be enforced in the same manner as in the case of an affiliation order, imposes upon the husband, by virtue of 35 & 36 Vict. c. 65, s. 4, and the Summary Jurisdiction Acts, a liability to imprisonment not exceeding three months. As the section creates a new offence and imposes a new liability, it has not, in the absence of express words, a retrospective effect. *Bourke* v. *Nutt* (1) is a clear authority in favour of the respondent; there it was held that s. 32 of the Bankruptcy Act, 1883, which imposes certain disqualifications "where a debtor is adjudged bankrupt," had not a retrospective effect; the decision in *Reg.* v. *Vine* (2) was considered and disregarded in that case.

SIR F. H. JEUNE, PRESIDENT. The only question for our determination is whether the particular provision of s. 4, which applies to this case, is retrospective or not. But upon the language of the section and the reason of the thing the matter seems to me extremely clear. The words "shall have been" are hardly ambiguous; in my view, they deal with all offences, past and future (considered with regard to the date of the Act), and not only to future offences. Another consideration which points in the same direction is that the section only provides a better way of enforcing an existing remedy. Before the Act, persistent cruelty would have entitled a married woman to a judicial separation in this court, with all its attendant consequences; but the Act gives a speedier and cheaper remedy by enabling the wife to obtain an order from a court of summary jurisdiction. It is suggested that, even if the rest of the section is retrospective, this particular provision is not; but it is very difficult to concur in such an interpretation, which would have the effect of giving a statutory indemnity to all husbands who had previously been guilty of persistent cruelty to their wives, and who had not been reached under previous statutes. It is contended that this particular portion of the section creates a new offence and a new remedy, and is therefore prospective only in its operation. That is not, I think, a sound contention. It does not appear to me that a new offence is created, and there

(1) [1894] 1 Q. B. 725.

(2) L. R. 10 Q. B. 195.

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certainly was a remedy in this court for the very same thing that the respondent is accused of. Upon this point the language of Mathew J. in *Reg.* v. *Birwistle* (1) is applicable to the present case: "The Act indeed," he says, "came into operation in 1886, but did not create the offence of deserting a wife without giving her any support: it merely afforded a better remedy." I am not sure, and I do not decide, whether persistent cruelty under this section is a new offence in the sense that it is not a continuing offence, and is therefore distinguishable from desertion; but it seems to me that the case is really covered by *Reg.* v. *Birwistle*. (1) The Act of 1886, under which that case was decided, gave for the first time jurisdiction in cases of desertion to courts of summary jurisdiction; and though it may be true that desertion is a continuing offence, it is clear from the judgment of Lord Coleridge C.J. that that was not the ground of the decision.

The only authority cited on behalf of the respondent that we need consider is *Bourke* v. *Nutt*. (2) In that case the language was different: "where a debtor is adjudged bankrupt," he was made subject to certain disqualifications. There the Bankruptcy Act did something entirely new: it imposed on bankrupts disqualifications to which they had never been subject before, and the Court of Appeal, thinking that the language was ambiguous, held that, on the true principle of construction, the section should not be construed so as to have a retrospective effect, but so as to operate only on cases and facts coming into existence after the statute was passed. In the present case the section uses words which are not ambiguous, and gives a remedy which is not new in principle, but only in kind.

There is a difference, however, between the language of this Act and that of s. 4 of the Matrimonial Causes Act, 1878, which provides that if a husband "shall be" (not "shall have been") convicted of an aggravated assault, an order for separation, &c., may be made; but it is clear that the expression "shall be" is there used for the simple reason that under that Act the order could only be made by the same Court or magistrate before whom the husband was convicted. In the present case the words "shall

(1) 58 L. J. (M.C.) 158.

(2) [1894] 1 Q. B. 725.

have been" are used, and for the obvious reason that the conviction and the order need not be made by the same tribunal. I am therefore clearly of opinion that this portion of s. 4 has a retrospective effect, and that this case must be sent back to the magistrates.

GORELL BARNES J. I am of the same opinion. The case is of some importance, for if we were to uphold the decision of the Court below the power of magistrates to inquire into and take into consideration acts of cruelty committed prior to the coming into operation of the Act would be excluded. The summons was taken out on the ground of persistent cruelty, by reason of which the respondent had caused the appellant to leave and live separately and apart from him, and it was dismissed by the magistrates on the ground that all the acts of cruelty which the appellant was able to prove had occurred prior to January 1, 1896, the day when the Act came into operation; the question, therefore, for us is whether, as regards this clause, the Act is retrospective or not. Looking at the wording of the section and at the whole Act, the question seems free from any doubt, and in my judgment the language used in s. 4 is not at all ambiguous. It seems quite clear to me that the expression "any married woman whose husband shall have been guilty of persistent cruelty to her may apply, &c.," deals with all cases of persistent cruelty which have happened prior to the decision of the Court. In regard to this matter I think that the Act imposes no new obligation on the husband. Under s. 5 the court of summary jurisdiction may order that the wife be no longer bound to cohabit with her husband, which order is to have the same effect as a decree of judicial separation on the ground of cruelty; it may give the wife the custody of the children under sixteen; it may order payment by the husband to the wife of a weekly sum not exceeding forty shillings, and may make an order as to costs. All these are matters which could previously have been dealt with by this Court in a suit for judicial separation; and the only effect of the provision in s. 4 of the Act of 1895 is to give to the wife a more speedy and economical remedy. I do not propose to deal with the cases which were cited in argument, and which have been fully dealt with by the President. I have not the slightest doubt that this provision of the Act is retrospective.

Appeal allowed.

Solicitors for appellant: *Bell, Brodrick & Gray, for Cuthbertson & Thomas, Neath.*

Solicitor for respondent: *T. D. Jones, for Moses Thomas, Aberavon.*

W. J. B.

1895
Dec. 17.

[IN THE CONSISTORY COURT OF LONDON.]

THE OFFICE OF THE JUDGE PROMOTED BY LEE *v.* FLACK.

Ecclesiastical Law—Jurisdiction—The Clergy Discipline Act, 1892 (55 & 56 *Vict. c.* 32), *ss.* 2, 12—*Clergy Discipline Act,* 1892, *Procedure Rules, r.* 34—*Simony—False Declaration under Clerical Subscription Act,* 1865 (28 & 29 *Vict. c.* 122)—*Meaning of* "*Offence against Morality not being a question of Doctrine or Ritual.*"

The 2nd section of the Clergy Discipline Act, 1892, provides, inter alia, that if a clergyman is alleged to have been guilty of any immoral act, immoral conduct, or immoral habit, or of any offence against the laws ecclesiastical, being an offence against morality and not being a question of doctrine or ritual, he may be prosecuted by any person approved by the bishop, and tried in the Consistory Court of the diocese in which he holds preferment; and by the 34th rule of the Procedure Rules made under the Act, a clergyman holding no preferment may be prosecuted under the Act in the Consistory Court of the diocese in which he resides.

The complaint in a criminal suit lodged in the registry of the Consistory Court of London at the instance of a person approved by the bishop, charged the defendant, a clergyman resident in the diocese, with having been guilty of offences against the laws ecclesiastical, being offences against morality and not being a question of doctrine or ritual, by having within the five years last past, and within the diocese, been guilty of simony, and knowingly made a false declaration against simony under the Clerical Subscription Act, 1865. The defendant brought in an answer denying that the offences alleged in the complaint were offences against the laws ecclesiastical, being offences against morality within the meaning of the 2nd section of the Clergy Discipline Act, 1892, and at the hearing of the issues of law raised on the pleadings, contended that the Consistory Court of London had no jurisdiction to entertain the suit:—

Held, by the ordinary, that the Consistory Court of London had jurisdiction in the suit under the Clergy Discipline Act, 1892.

ON July 22, 1895, Frederick Hugh Lee, of No. 1, The Sanctuary, in the City of Westminster, prosecuting under the

Clergy Discipline Act, 1892, as a person approved by the Bishop of London, lodged with the registrar of the Consistory Court of London a complaint against the Rev. G. Sutton Flack, of the vicarage of St. Stephen's, South Kensington, which, after stating the preferment (if any) held by the defendant to be that of "vicar of St. Stephen's, South Kensington," set out the particulars of the charges brought against the defendant in the following terms:—

"That the defendant has been guilty of an offence or offences against the laws ecclesiastical, being an offence or offences against morality and not being a question of doctrine or ritual. To wit, Charge 1: The defendant has within the diocese of London offended against the laws ecclesiastical by having, within five years last past, been guilty of simony in that in the month of January, 1894, the new vicarage of St. Stephen's, South Kensington, being then vacant by the death of the late vicar, the Rev. Joseph Waldo, who had died on December 31, 1893, he the defendant, by himself or his brother W. Sutton Flack acting with his (the defendant's) concurrence and on his behalf, made promises and engagements of a pecuniary and simonical nature directly and through his solicitor to the late Mrs. A. Cator, of Stone Court, Carshalton, Surrey, widow, now deceased, the then patroness of the said living, who, being moved by and in consideration of the said promises and engagements, in January, 1894, presented the defendant to the Bishop of London, and that upon such presentation the defendant was instituted and subsequently inducted to the said vicarage. Charge 2: The defendant knowingly made a false declaration against simony under the Clerical Subscription Act, 1865, previous to his admission to the benefice of St. Stephen's, South Kensington."

The registrar having duly submitted the complaint to the Bishop of London, and the Bishop of London not having signified that the complaint was too vague or frivolous to justify proceedings, a copy of the complaint, with notice and form of answer, was served on the defendant, and he, on August 22, 1895, brought into the registry an answer—in paragraph 1—denying that he had been guilty of any offence or offences against the laws ecclesiastical, or that the offence or offences or any of them alleged in the complaint was or were offences against the laws ecclesiastical, being an offence or offences against morality within the meaning of s. 2 of the Clergy Discipline Act, 1892 (1);—in paragraph 2—denying all the allegations set out in paragraph 1 of the complaint; and—in paragraph 3—further denying that he had knowingly made a false declaration against simony under the Clerical Subscription Act, 1865, previous to his admission to the benefice of St. Stephen's, South Kensington.

1895. Nov. 30. On this day, by the direction of the Chancellor of the diocese of London [Dr. Tristram Q.C.] the issues of law raised on the complaint and answer came on to be heard before him previously to the trial of the cause on the merits. (2)

H. C. Richards, and *Soper*, appeared for the defendant. The sole question to be argued is whether the offences of simony and of making a false declaration against simony under the Clerical Subscription Act, 1865, are under the provisions of the Clergy Discipline Act, 1892, justiciable in the Consistory Court of the diocese in which the defendant holds preferment, or not having any preferment, resides. (1) This question must be decided in favour of the defendant, and the cause be dismissed as brought without jurisdiction, if the whole of the provisions of the Act are taken into consideration, and it be not forgotten that, although suits against criminous clerks for simony be not within the provisions of the Act of 1892, they can as before that Act and since 1840 (*In the Matter of the Dean of York* (2); *Lee* v. *Merest* (3)) still be brought before the special tribunals on which jurisdiction was conferred by the Church Discipline Act, 1840 (4)—a jurisdiction which still remains in full force and effect for all ecclesiastical cases not within the provisions of the Act of 1892. [They referred to Phillimore's Ecclesiastical Law, vol. ii. p. 1013, 55 & 56 Vict. c. 32, s. 14, *Harris* v. *The Bishop of Rochester*. (5)] Sect. 2 of the Act of 1892, so far as material, gives this Court jurisdiction in cases in which a clergyman is charged with immoral habits, acts, or conduct, or any offence against the ecclesiastical law, being "an offence against morality and not being a question of doctrine or ritual," and in a subsequent section—s. 12—a definition is given of immoral act, immoral habit, and immoral conduct by a reference to canons 75 and 109 of the Canons of 1603. Now in neither of these canons, nor in s. 2 itself, is any reference made to the offence of simony, whilst canon 40 of the Canons of 1603, in which "the detestable sin of simony" is referred to, is not mentioned either in that section or elsewhere in the Act. The offences over which the 2nd section gives jurisdiction are, in fact, offences ejusdem generis with that referred to in canons 75 and 109 of 1603, and "simony," if intended to have been included within the section, would have been expressly named. Moreover, the punishment of simony, if the offence is committed by a beneficed clerk, is necessarily deprivation: Phillimore's Ecclesiastical Law, vol. ii. p. 876; Gibson's Codex, p. 801; whilst by s. 6 of the Act of 1892 offences triable under the Act may, in the discretion of the Court, be punished by deprivation and be pardoned by the Crown. It is not enough for the prosecutor to shew that "simony" may be described as an offence against morality; but to uphold the jurisdiction of the Court in this case it must be shewn that the Legislature, though the expression "simony" occurs in no part of the Act, has impliedly altered the law, and by creating a new tribunal for the trial of "offences against morality" withdrawn the offence of simony from the jurisdiction conferred on the bishop of the diocese and the Court of the Province under the Church Discipline Act, 1840. [They referred to *Cox* v. *Hakes* (1).]

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(1) The material portion of the 2nd section of the Clergy Discipline Act, 1892, is as follows: "If a clergyman . . . . is alleged to have been guilty of any immoral act, immoral conduct, or immoral habit, or of any offence against the laws ecclesiastical, being an offence against morality and not being a question of doctrine or ritual, he may be prosecuted by any of the parishioners of the parish in which such clergyman holds preferment, or by the bishop of the diocese, or by any person approved by the bishop, and tried in the Consistory Court of the diocese in which he holds preferment . . . ."

Sect. 12 of the same Act provides as follows: "In this Act, unless the context otherwise requires—

"The expression 'clergyman' means a clergyman, not being a bishop of a diocese, who is in holy orders in the Church of England . . . .

"The expressions 'immoral act,' 'immoral conduct,' and 'immoral habit' shall include such acts, conduct, and habits as are proscribed by the seventy-fifth and one hundred and ninth canons issued by the Convocation of the Province of Canterbury in the year one thousand six hundred and three."

The text of the 75th and 109th canons of 1603 is set out in a note to the case of *The Bishop of Rochester* v. *Harris* ([1893] P. 139, note (3)).

(2) The 95th rule of The Clergy Discipline Act, 1892, Procedure Rules is as follows: "Any powers given under these rules shall be in addition to and not in derogation of any other power which may be exercised . . . . by the chancellor of the diocese."

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(1) Rule 34 of the Clergy Discipline Act, 1892, Procedure Rules provides as follows: "Where a clergyman holds no preferment within the meaning of the Act he may, if he resides or is alleged to have committed an offence in England or Wales, be prosecuted in the Consistory Court of the diocese in which he resides or in which the offence is alleged to have been committed, as if he held preferment in that diocese." As to the power of making this rule, see the Clergy Discipline Act, 1892, s. 9.

(2) 2 Q. B. 1.

(3) 39 L. J. (Eccl.) 53.

(4) 3 & 4 Vict. c. 86.

(5) [1893] P. 137.

Arnold Statham, appeared for the prosecutor, in support of the jurisdiction of the Court. Simony and the making a false declaration against simony are offences against the laws ecclesiastical, and they are also "offences against morality" within the plain language of the 2nd section of the Clergy Discipline Act, 1892. The suit has therefore been rightly brought in this Court. Under the Act of 1892 the suit can be brought within five years of the offences committed, whilst under the Act of 1840 the corresponding limit was two years. The Legislature must have intended that this alteration of the law should apply to simony and kindred offences. [In addition to the authorities mentioned in the judgment he referred to 3 Inst. 156; Cunningham, Law of Simony, ed. 1784, pp 1 2, 4, 52, 147; *The Bishop of London* v. *Ffytche*. (2)]

Richards, in reply.

Cur. adv. vult.

1895. Dec. 17. DR. TRISTRAM. This is a suit prosecuted by Mr. Frederick Hugh Lee, with the approval of the Bishop of London, against a beneficed clerk in this diocese under the Clergy Discipline Act, 1892, for having been guilty of simony by inducing the patroness of the benefice he now holds to present him to the bishop for admission to the same, and to which he was subsequently instituted and inducted, in consideration of a pecuniary promise or engagement made to the patroness or to her solicitor by the clerk himself, or his brother with his concurrence.

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(1) 15 App. Cas. 506 at p. 517.

(2) 1 Bro. C. C. 95; 1 East, 487.

The defendant in his answer denies that he has been guilty of the offence charged, or that it is an offence against morality within s. 2 of the said Act, and on the last ground submits that it is not within the jurisdiction of the Court to entertain this suit.

The preliminary question, namely, whether or not this Court as constituted under the said Act, has jurisdiction to entertain the suit was very ably argued at the sitting of the Court on November 30 by counsel on both sides, who cited various cases and authorities bearing on the issue.

Before the Church Discipline Act of 1840 came into force the Bishops' Diocesan Court had jurisdiction to entertain criminal suits against any clerk in the diocese for an alleged offence against ecclesiastical law. But it was provided by that statute that in the future such suits were only to be instituted either in the provincial court of the diocese or in a special court presided over by the bishop of the diocese.

The Clergy Discipline Act of 1892 has restored to the Consistorial Courts jurisdiction to entertain suits as courts of first jurisdiction against clergymen for offences against morality, leaving them in other cases subject to the jurisdiction established by the Church Discipline Act, 1840.

By s. 2 the Act of 1892 confers on the Consistorial Courts jurisdiction to try clergymen for any offence against the laws ecclesiastical being an offence against morality, and not being a question of doctrine or ritual. To bring the present case within the words of this section, the Court must be satisfied that the offence of simony as laid against the clerk charged is an offence against morality as well as one against ecclesiastical law.

The material words of the section on this point are, that a clergyman alleged to have been guilty of any immoral act, immoral conduct, or immoral habit, or any offence against the laws ecclesiastical, being an offence against morality and not being a question of doctrine or ritual, may be tried for such an offence in a Consistorial Court.

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The first question is whether simony is an offence against ecclesiastical law. That that is so is beyond all doubt. By canon 1 of the canons enacted at the Synod of Westminster, A.D. 1127, in the presence of Henry II., churches, benefices, and dignities are forbidden to be sold or bought, and if the offender be a clergyman he is to be degraded: 2 Johnson's English Canons, mcxxvii.; see also Lyndwood, Provinciale, in Lib. v. tit. 3, p. 281, who writes: "Nulli licet . . . . pro præsentatione alicujus personæ pecuniam, vel aliquod aliud emolumentum, pacto interveniente recipere."

Canon 40 of the Canons of 1603 enjoins an oath against simony to be taken by every clerk in holy orders on admission or institution to an ecclesiastical dignity or benefice for which the corresponding canon of 1866 substitutes a solemn declaration to the like effect.

The next question is whether simony is an offence against morality. This will depend upon the nature of the charge laid against the defendant. The charge is in substance that whilst the benefice which the defendant now holds was vacant a promise or engagement, to which he was a party or privy, was made to the patroness that if she presented him to it she should receive a pecuniary advantage or consideration; that she was induced by this promise or engagement to present him to it, and that on her presentation, after he had made a solemn declaration before the bishop that he had not made by himself or any person on his behalf any simoniacal promise to obtain the benefice, he was instituted to it by the bishop or afterwards inducted into it.

If the word "morality" is to be read in this section as referring solely to acts or conduct usually designated as "vicious," it might be held not to cover the present charge. If it is to be read as including offences against the moral law generally, then I am of opinion that the Court would be justified in holding that it covered the charge laid in the complaint.

What is the defendant charged with having done against the moral law? He is charged with having been, in violation of the common law, of the canon law, and of the statute law of England, a party or privy to the purchase from the patroness for himself of a presentation to a benefice actually vacant for a pecuniary consideration; also with having made a solemn declaration in the presence of the bishop that he had been party or privy to no such transaction, and had thereby by practising deceit upon the bishop induced his lordship to institute him to the benefice. In what terms is such conduct spoken of in the canons, the statute law, and by eminent judges? Canon 40 of the Canons of 1603 and of 1866 speaks of it as the detestable sin of simony; in 1 Wm. & M. c. 16, a simoniac clerk is spoken of as being guilty "of a crime." Lord Coke, in the case of *Sir William Boyer* v. *The High Commission Court* (1), designates the payment of money for a presentation to a benefice as "an enormous offence," and "worse than felony," and elsewhere "as contra bonos mores." Sir John Nicholl, in the Arches, speaks of conduct such as is here charged against the defendant as "an odious and corrupt bargain," and "a crime." *Whish and Woollat* v. *Hesse* (2); see also *Walsh* v. *The Bishop of Lincoln.* (3)

There being nothing in the interpretation clause (s. 12), or in the other provisions in the Act, to compel the Court to put a restrictive meaning on the word "morality" as used in s. 2, I am of opinion that this Court has jurisdiction to entertain this suit, but I must add that to entitle the prosecutor to succeed in it he should satisfy the Court not only that the patroness presented the defendant to the benefice under the belief that she would receive a pecuniary advantage for so doing from his brother, but also on undoubted evidence that the defendant was privy to any such promise or engagement. For, unless such proof of such a nature is forthcoming, the Court would be bound to find that the defendant was not simoniacus, and to condemn the prosecutor in costs. On the last point the observations of Sir John Nicholl in *Whish and Woollatt* v. *Hesse* (4) are very pertinent, and would be binding on this Court.

If the defendant is not simoniacus, he may still be simoniace promotus, and on this ground liable in a civil suit instituted in this Court against the devisee of this advowson under the will of the late patroness and the executrix of that will to have his institution and induction annulled by the Court, in which case the next presentation would devolve on the Crown, under 31 Eliz. cap. 6. From a correspondence submitted to me as Chancellor on behalf of the Bishop of London prior to the commencement of this suit, it appeared to me that this was a case in which his Lordship was bound to take judicial action.

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(1) 2 Bulst. 182.

(2) 3 Hagg. Eccl. 659, 721.

(3) L. R. 10 C. P. 518, at p. 532.

(4) 3 Hagg. Eccl. 659, 680, 693, 721.

After the case had been referred to me it seemed to me that it might come before me in this Court, either under the Clergy Discipline Act, 1892, or in a civil suit, and accordingly it was placed in other hands.

Should the counsel for the bishop consider that he is not in possession of conclusive evidence that the defendant is simoniacus, it is open to the prosecutor to apply for leave to abandon these proceedings with a view to a civil suit being instituted by the bishop against the executrix of the late patroness and devisee of the advowson for the purpose of obtaining a decree from this Court annulling the defendant's institution and induction into the benefice on the ground that he was simoniace promotus, and of thereby removing the existing scandal in the parish on this transaction. I can find no instance of a civil suit having been instituted for this purpose, and in the case in the Arches I have referred to, *Whish and Woollatt* v. *Hesse* (1), which was heard in 1832, Sir John Nicholl directed search to be made for one, but none could be found, but there are intimations in his judgment that it would be competent for a civil suit to be instituted for this purpose in the Ecclesiastical Court; and since the last sitting of the Court I have gone very fully into this question and have come to the conclusion that a civil suit might be instituted by the bishop for the purpose I have mentioned on the following grounds:—

First, that according to the decisions of the Common Law Courts it appertains to the Spiritual Court to determine simony and not to the Common Law Courts to meddle therewith: *Baker* v. *Rogers* (2) and in *Riesby* v. *Wentworth* (3), on application for prohibition it was held that simony might be more aptly tried in the Spiritual Court than in the Civil Court.

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(1) 3 Hagg. Eccl. 659, 721, 722.

(2) Cro. Eliz. 788.

(3) Cro. Eliz. 642.

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Secondly, that the jurisdiction to try questions of simony is expressly reserved to the Ecclesiastical Court by s. 8 of 31 Eliz. c. 6, and by s. 2 of 1 Wm. & M. c. 16.

Thirdly, that in books of authority on questions of practice in the Ecclesiastical Courts it is laid down that questions of simony may be determined in a criminal or a civil suit, and Oughton, who is spoken of by Lord Stowell as an oracle on questions of practice, in his Ordo, Tit. 4, s. 9, writes: "Si clericus commisit simoniam, in obtinendo beneficium ecclesiasticum, potest (sive ex officio judicis," i.e. in a criminal suit; "sive ad instantiam partis," i.e. in a civil suit); "conveniri, ac juxta sanctiones canonicas puniri: Sic etiam laici, participes ejusdem criminis."

Fourthly, that it was held in *The Bishop of Lincoln* v. *Smith* (1) and approved of in a judgment delivered by Lord Campbell in the Queen's Bench: *Ex parte Medwin and Hurst* (2), that a bishop may institute a civil suit in his own court on the ground that the bishop's judge is an independent judge and cannot be controlled by the bishop therein.

Fifthly, that in this case the bishop has a sufficient interest to institute a civil suit, as it was by his act of institution that the defendant obtained admission to the living, and the bishop having instituted him without a full knowledge of the facts of the case, is a proper person to take proceedings to have that institution set aside.

In this case I pronounce for the jurisdiction of this Court to entertain this suit, and I give the prosecutor the costs of the argument on the last Court day.

The further proceedings in this case had better stand over to enable the counsel for the prosecutor to determine whether he will proceed with this suit or abandon it, and apply on behalf of the bishop for leave for a citation to issue against the devisee of the advowson and executrix of the late patroness in a civil suit with a view to obtain a decree annulling the defendant's institution and induction on the ground that he was simoniace promotus by the patroness innocently and under a misapprehension of the law.

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(1) 1 Ventr. 3.

(2) 1 E. & B. 609.

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As the solicitor for the defendant has given notice of appealing, I give leave to appeal in case any leave to appeal is necessary.

Solicitors for prosecutor: *Bolton & Lee.*
Solicitors for defendant: *W. Carpenter & Sons.*

C. F. J.

1896
March 30.

IN THE GOODS OF VON LINDEN.

Probate—Foreign Will—German Law—Probate of Copy.

The will of a German subject domiciled in the kingdom of Wurtemburg at his death had been proved in Wurtemburg in accordance with the requirements of local law and deposited with a notary, who by the law of the country was forbidden to allow it to leave his custody. It contained a direction that during her lifetime the widow should have the unrestricted right of administration and usufruct of the testator's estate without giving security, which according to the local law was equivalent to appointing her executrix, and entitled her to collect the personal estate as though she were the owner thereof. Part of the personal estate was in England:—

Held, that probate might be granted to the widow of a copy of the original will properly proved, limited to such time as might elapse before the original will itself should be brought in.

MOTION on behalf of the Baroness Fanny von Linden for a grant of probate to her as executrix according to the tenor of the will of the testator, her late husband, as contained in a certified notarial copy thereof.

The testator, the Baron Hugo von Linden, was a German subject, domiciled in the kingdom of Wurtemburg, and died at Stuttgart, in that kingdom, on October 8, 1895. By his will, dated May 8, 1886, which was made in accordance with the law of the kingdom of Wurtemburg, he appointed his wife his heir, giving her the income of his property for life. The will contained the following clause: "My wife shall during her lifetime have the unrestricted right of administration and of usufruct of the whole of my estate and without giving any security." From the affidavit of Dr. Cruesemann, a German advocate, it appeared that the original will, after being opened in the presence of the family, was not allowed to leave the country, but was filed with a notary acting on behalf of a body called the Theilungsbehörde, to which in each parish the custody of wills was entrusted, and that a notarial copy of the will was accepted as sufficient evidence of the contents in all courts of the German empire. The affidavit further stated that, by virtue of the above direction in the will, the widow was to all intents and purposes in the same position as if she had been expressly named executrix in the will, and was entitled to collect all the assets of the testator's estate, so far as it consisted of personal property, as though she were the owner thereof. The testator had left personal estate of the value of about 10,000*l.* in this country.

Priestley, for the applicant. The widow is entitled to a grant of probate as executrix according to the tenor, and not merely to administration, it being clear that according to the local law she has under the will all the powers of an executrix. The case is very like that of *In the Goods of Briesemann.* (1) The proper form of order is to grant probate of a notarial copy of the will, as was done in *In the Goods of Lemme.* (2)

SIR F. H. JEUNE, PRESIDENT. There is no exact authority governing the present case, but it is covered by the principle laid down in *In the Goods of Briesemann.* (1) That principle is that where in a foreign will a person is in terms named executor, probate will be granted in this country to that person, but that where the powers granted to a person in the will fall short of the powers of executors according to English law, there will be a grant to him of administration with powers as near as may be to those granted by the will. The present case lies between those two cases. On the one hand the applicant has not been in terms appointed executrix, but we are able to infer that it was the intention of the testator

(1) [1894] P. 260.

(2) [1892] P. 89.

that she should have the powers of an executrix; that is, she is an executrix according to the tenor. In dealing with a foreign will it is of course even more necessary than in the case of an English one that the Court should be satisfied that the powers granted by the will are those of a full executor; but the affidavit of Dr. Cruesemann satisfies me that that is so in the present instance. I think, therefore, that this will may be read as though it in terms called the applicant an executrix, and that probate may be granted to her as executrix according to the tenor. As to the form of the grant, I follow the decision in *In the Goods of Lemme* (1), and there will be a grant of probate of a copy of the original will properly proved, limited to such time as may elapse before the original will is brought in.

Solicitors: *Clarke, Rawlins & Co., for Percival & Son, Peterborough.*

(1) [1892] P. 89.

W. J. B.

IN THE GOODS OF SAUL.

1896
April 20.

Probate—Affidavit as to Date of Death—Presumption of Death—Filing Letter from Life Insurance Company.

On a motion for a grant of probate and for leave to depose as to the death of the testator, although the only proof of his death was by presumption from his disappearance, it appeared that notice of the motion had been given to a company with whom the testator had insured his life, and that a letter had been written in reply stating that the company did not intend to interfere in the proceedings.

The Court granted the application subject to the letter being filed.

MOTION by the widow and executrix of John Saul, mate of the *Star of Austria*, for leave to make an affidavit that he had died on or since March 31, 1895, after which date the ship had not been heard of, and for probate of his will. It appeared that a letter (in answer to their notice of the motion) had been received by the solicitors to the applicant from an insurance company with whom the deceased had insured his life, stating that they did not intend to interfere in respect of either application, but that this letter had not been filed.

Bargrave Deane, in support of the motion.

GORELL BARNES J. The letter of the insurance company should be filed. Subject to this being done, the motion may be granted.

Solicitors: *Rowcliffes, Rawle & Co.*

H. D. W.

1896
April 15, 28.

RUCK *v.* RUCK.

Divorce—Evidence—Decree in previous Suit.

On a petition by a wife for dissolution of her marriage on the ground of adultery coupled with desertion, the decree in a previous suit in which her husband had been co-respondent was produced. This decree stated that the jury found that the respondent had been guilty of adultery with the co-respondent, and that he had been condemned in costs, but contained no finding by the jury that the co-respondent had been guilty of adultery with the respondent:—

Held, that the decree was not by itself sufficient evidence of adultery against the husband.

PETITION of Ellen Elizabeth Ruck for the dissolution of her marriage with Henry Ruck on the ground of adultery coupled with desertion. There was no defence.

The adultery charged was with Caroline Edith, the wife of John Harold Watson, and had been the subject of a decree of dissolution in 1894 in a case of *Watson* v. *Watson and Ruck*, tried before a jury, in which the co-respondent had not appeared. The decree in that case was produced and stated that the jury found that the respondent had been guilty of adultery with the co-respondent, and that he had been condemned in costs, but did not contain a finding that the co-respondent had been guilty of adultery with the respondent.

Barnard, for the petitioner.

GORELL BARNES J. The decree does not find that the co-respondent was guilty of adultery. The case must be adjourned for further evidence.

April 28. A chamber-maid who at the trial in 1894 had given evidence of adultery committed at an hotel by the then co-respondent and now respondent, repeated her evidence, and stated that the woman with whom he was found was not the petitioner.

GORELL BARNES J. granted a decree nisi.

Solicitors: *Andrew, Wood & Co., for Ley Wood & Rickerby.*

H. D. W.

WILLIAMS *v.* WILLIAMS AND POCOCK.

1896
April 20.

Divorce—Practice—Co-Respondent—Substituted Service—Necessity of Affidavit by Petitioner—Rules of 1865, *rr.* 10, 11, 12, 13. (1)

On an application to allow substituted service of a petition on a co-respondent, there should be an affidavit by the petitioner.

Application on behalf of the petitioner that substituted service of the petition on the co-respondent might be allowed. An affidavit of the petitioner's solicitors' clerk stated that the co-respondent was keeping out of the way, but often visited the house of a sister, where it was proposed to leave a copy of the petition. There was no affidavit by the petitioner.

Bargrave Deane, for the petitioner.

Gorell Barnes J. According to the practice of the Court, there should be an affidavit by the petitioner. Subject to the filing of an affidavit by the petitioner, I grant the application.

Solicitors: *Bolton & Co.*

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(1) By rules 10, 11, 12, 13 of 1865, citations are to be served personally when that can be done.

Service of a citation shall be effected by personally delivering a true copy of the citation to the party cited, and producing the original, if required.

To every person served with a citation shall be delivered, together with the copy of the citation, a certified copy of the petition under the seal of the Court.

In cases where personal service cannot be effected, application may be made by motion to the Judge Ordinary, or to the registrars in his absence, to substitute some other mode of service.

H. D. W.

1896
March 24;
April 27.

THE COPERNICUS.

Admiralty—Insurance (Marine)—Freight—Commencement of Risk—Time of Engagement of Goods—Loading Port.

The defendant underwrote a policy on freight by steamer $\frac{\text{and}}{\text{or}}$ steamers belonging to the plaintiffs "lost or not lost at and from any port or ports of loading on the west coast of South America to any port or ports of discharge in the United Kingdom," the freight to be covered "from the time of the engagement of the goods."

Offers of cargo having been received from the plaintiffs' agents at Valparaiso for a voyage to the United Kingdom from that and other ports on the west coast of South America, one of the plaintiffs' steamers, for the purpose of loading this cargo, left Monte Video, calling at Punta Arenas in the Straits of Magellan, where she discharged and loaded cargo and left that place for Valparaiso, but has not since been heard of. At the time of her leaving Punta Arenas cargo had been engaged at Valparaiso for the vessel, and was ready for shipment in her there and at other ports on the west coast.

The plaintiffs declared the freight upon the goods engaged for the steamer, and sought to recover from the defendant his proportion of the total loss:—

Held, by Gorell Barnes J., that the defendant was not liable, as the "engagement" clause must be construed with reference to the voyage described in the policy, and the vessel not having arrived at her first loading port on the west coast of South America, the risk had not attached.

Action on two policies of marine insurance.

The plaintiffs, the Liverpool, Brazil, and River Plate Steam Navigation Company, Limited (Lamport & Holt's Line), the owners of the steamship *Copernicus*, sued the defendant Benjamin Holmes, an underwriter at Lloyd's, for 54*l*. 18*s*. 5*d*., being his proportion of an alleged total loss of freight engaged for the *Copernicus* on her intended homeward voyage from the west coast of South America.

The defendant denied his liability on the ground that the loss was not covered, and the question for decision was as to the meaning of a clause written into the ordinary form of a Lloyd's policy that the freight was covered "from the time of the engagement of the goods."

The material facts were :—

By two policies, each covering 50,000*l.*, dated respectively March 1 and November 28, 1895 (the latter policy being expressed to follow and succeed the former), the plaintiffs were insured by the defendant and other underwriters "on freight $\frac{\text{and}}{\text{or}}$ charges as interest may appear" by "steamer $\frac{\text{and}}{\text{or}}$ steamers belonging to, chartered by, or managed by" the plaintiffs or by Messrs. Lamport & Holt, "lost or not lost at and from any port or ports of loading on the west coast of South America to any port or ports of discharge in the United Kingdom," or in certain other countries as therein described, the policies "to cover the freight from the time of the engagement of the goods or after a shipping order has been issued by the agent or his broker."

In September, 1895, offers of cargo were received from the plaintiffs' agents at Valparaiso for a voyage to the United Kingdom from ports on the west coast of South America, and, for the purpose of loading this cargo, the *Copernicus* on October 8 left Monte Video for Punta Arenas in the Straits of Magellan, where she discharged and loaded a small quantity of coasting cargo, and, on October 16, left that place for Valparaiso, but had not since been heard of. She appears to have been lost by perils insured against at some time after October 16 between Punta Arenas and Valparaiso, and was posted at Lloyd's as missing on January 29, 1896. When the *Copernicus* sailed from Punta Arenas there was cargo engaged for her at Valparaiso ready for shipment by her there and at other ports on the west coast, the freight upon which would have amounted to 4900*l.*

On December 17, 1895, the plaintiffs declared this amount upon the policies, namely, 3700*l.* on the first (which exhausted that policy), and 1200*l.* on the second policy; but the defendant, who had underwritten the first policy for 580*l.* and the second for 500*l.*, refused to accept the declaration.

March 24. The action was tried upon an agreed statement of facts to which the two policies were annexed.

Joseph Walton, Q.C., and *T. G. Carver*, for the plaintiffs.

These policies covered the freight from the time of the engagement of the goods—that is, the risk began as soon as freight was engaged for the plaintiffs' steamer from a port on the west coast to a port in the United Kingdom, although the vessel was only on her way and had not yet arrived at the port of loading. The words describing the voyage are expanded by the "engagement" clause, which was expressly inserted for the purpose of adding this further risk, just as clauses are now added to cover transit from or to warehouses. [They referred to *Simon, Israel & Co.* v. *Sedgwick* (1); *Hydarnes ss. Co.* v. *Indemnity Mutual Marine Assurance Co.* (2)]

Sir Walter Phillimore and *J. A. Hamilton*, for the defendant. The loss is not covered. These are voyage policies, and the words "at and from any port or ports of loading" must be read with the clause relied upon by the plaintiffs. The combined effect is to make it a condition precedent before the "engagement" clause can apply that the *Copernicus* should be in a position to perform the voyage and earn the freight. She never was in this position as she never got to Valparaiso, which was her first loading port. In *Jones* v. *Neptune Marine Insurance Co.* (3) the material words were "from Baker's Island," and "the insurance on the said freight beginning from the loading of the said vessel." The vessel was wrecked whilst at Baker's Island after she had taken two-thirds of her cargo on board, and the whole Court held that the assured could not recover, Blackburn J. being of opinion that the latter part of the clause did not enlarge the effect of the former.

The contention of the plaintiffs would make these policies world-wide, as they would cover a loss in the case of any of the plaintiffs' steamers proceeding from any place however distant to the port where the goods were engaged, and would involve the underwriter in speculative risks never contemplated by him. The object of the "engagement" clause is to cover the risk of loss of freight in respect of goods engaged at other loading ports than the one at which the vessel may have arrived prior to her loss, and the clause may also cover the risk of loss of

(1) [1893] 1 Q. B. 303. (2) [1895] 1 Q. B. 500.
(3) L. R. 7 Q. B. 702.

1896

THE COPERNICUS.

freight for cargo which, though engaged, is not ready for shipment when the vessel is lost—that is, the effect of the clause is to provide that the freight shall be covered so soon as goods are engaged and the carrying ship is at the loading port, though the vessel may not be ready to receive the cargo, or the goods may not be ready for shipment. [They referred to *Devaux* v. *J'Anson* (1) and *Flint* v. *Flemyng* (2) cited in Arnould on Marine Insurance, 6th ed. vol. i. p. 436.]

Carver, in reply. In *Jones* v. *Neptune Marine Insurance Co.* (3) Mellor and Lush JJ. held that the words "the insurance on the said freight beginning from the loading of the said vessel" did extend the previous clause, though they thought that the words "from the loading" meant from the "completion of" the loading. The engagement clause in these policies defines the time of the inception of the risk and makes it irrespective of the place of the commencement of the voyage. There is nothing unreasonable in this, as freight may be lost not only by perils to the ship but by perils to the goods whilst on shore, and the clause is intended to provide against this latter risk.

Cur. adv. vult.

April 27. GORELL BARNES J. [After stating the facts already set out, the learned judge proceeded:—] The question in dispute turns on the meaning of the clause, "This policy to cover the freight from the time of the engagement of the goods or after a shipping order has been issued by the agent or his broker." But for this clause it is clear that, as the vessel had not arrived at any port of loading on the west coast of South America before her loss, the policies would not have attached. The risk insured would not have commenced.

It was, however, contended on behalf of the plaintiffs that the clause covered the freight from the time of the engagement of the goods, although the vessel had not arrived at a loading port on the west coast of South America. On the other hand, it was urged on behalf of the defendant that upon the true

(1) 5 Bing. N. C. 519.

(2) 1 B. & Ad. 45.

(3) L. R. 7 Q. B. 702.

1896

THE COPERNICUS.

Gorell Barnes J.

construction of the policy no risk could attach before the vessel arrived at her first loading port, and that the clause was intended as far as possible to provide against questions which might be raised as to the loss of freight in respect of goods which at the time of the loss of the vessel might not actually be ready at the shipping port, though engaged for shipment, and, perhaps, also questions in connection with the loss of freight on goods engaged at other ports than the first loading port if the vessel should be lost at or after her first loading port.

In my opinion the latter construction is right. It is to be observed that the policies are not taken out to cover the freight of the *Copernicus* only, but are "on freight $\frac{\text{and}}{\text{or}}$ charges as interest may appear" by "steamer $\overset{\text{and}}{\text{or}}$ steamers." The terminus a quo of the voyage is stated in the policies to be "at and from any port or ports of loading on the west coast of South America." If the construction placed upon the clause by the plaintiffs be correct, it would have the effect of making the risk attach to freight on goods engaged for a steamer from the time of the engagement, wherever the steamer might be and however long and dangerous the voyage of the steamer to the first loading port might be; and even if it be said that the risk ought not to be carried further back than the time when the vessel starts on her voyage to the loading ports to load the engaged goods, yet still, if the plaintiffs are correct, the freight on goods engaged for a steamer belonging to, chartered by, or managed by the plaintiffs or Messrs. Lamport & Holt, starting from any part of the world to load the goods, would be covered from her start.

It seems to me that this cannot be the true meaning of the policy, and that where the terminus a quo is expressed in the policy, if it be desired to carry the risk back to some earlier place, clear words to produce that result should be used.

The clause should, I think, be construed with reference to the voyage described in the policy, and was intended, so far as its terms allow, to prevent questions being raised of the character of those which were in controversy in the cases collected in Arnould on Insurance, under the head of "Duration of the

Risk on Freight." (1) My judgment must be for the defendant, with costs.

Solicitors for plaintiffs: *Stokes & Stokes, for Thorneley & Cameron, Liverpool.*

Solicitors for defendant: *Waltons, Johnson, Bubb & Whatton.*

T. L. M.

IN THE GOODS OF BRYANT.

1896
April 27.

Administration—Intestate's Estate of Value under 500*l.*—*Grant to Executor of Widow who had not taken Administration—Intestates' Estates Act*, 1890 (53 & 54 *Vict. c.* 29), *s.* 1—*Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.

A widow died without taking administration to her husband's estate, which was of the net value of under 500*l.*, and, as he died without issue, belonged exclusively to her, under s. 1 of the Intestates' Estates Act, 1890. The Court granted administration to her executor, under s. 73 of the Court of Probate Act, 1857.

JOHN BRYANT died in 1895, intestate, without parent or child, but leaving a widow, four brothers, three sisters, and five nephews and nieces, children of a deceased sister, his next of kin and entitled in distribution. The estate was of the value of about 355*l.*, and therefore passed exclusively to the widow under s. 1 of the Intestates' Estates Act, 1890. (2) She died in 1895 without taking administration, and in the same year made a will disposing of all her property, and appointing Joseph Keith her executor; who duly proved the will, and now applied for administration to John Bryant's estate.

Willock, for the applicant. The executor is entitled to administration, in priority to the next of kin. The estate vested

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(1) Arnould on Marine Insurance, 6th ed. vol. i. part i. ch. ix. pp. 432 to 448.

(2) By the Intestates' Estates Act, 1890 (53 & 54 Vict. c. 29), s. 1, "The real and personal estates of every man who shall die intestate after the first day of September, 1890, leaving a widow but no issue, shall, in all cases where the net value of such real and personal estates shall not exceed five hundred pounds, belong to his widow absolutely and exclusively."

1896

IN THE GOODS OF BRYANT.

in the testatrix by the statute, and passed to the executor under her will. [He cited *Rees* v. *Cart.* (1)]

GORELL BARNES J. There the husband was entitled to the whole of the intestate wife's estate. Here there is a possibility of the intestate husband's estate proving afterwards to be of more value than 500*l.* Under the circumstances I had better grant the wife's executor administration under s. 73 of the Court of Probate Act, 1857.

Solicitors: *Rowcliffes, Rawle & Co., for Ponsford, Joyce & Davis, Bardon, near Taunton.*

H. D. W.

Not followed. KARA *v.* KARA AND HOLMAN. [1948] P. 287

1896

March 3; *May* 5.

EARNSHAW *v.* EARNSHAW.

Husband and Wife—Maintenance, Neglect to provide—Evidence of Means—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), s. 4*—Appeal—Costs of Wife when unsuccessful Respondent.*

Upon the hearing by a court of summary jurisdiction of a summons taken out by a married woman under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, charging her husband with wilful neglect to provide reasonable maintenance for her, the Court, before making an order, must be satisfied that the husband either is in receipt of actual earnings or has the capability of earning a livelihood; evidence of means cannot be entirely dispensed with.

Where a married woman is an unsuccessful respondent in an appeal to the Probate, Divorce and Admiralty Division under the Summary Jurisdiction (Married Women) Act, 1895, the Court, without laying down any binding rule of practice, will in ordinary cases follow the practice in matrimonial causes, and order her costs of the appeal to be paid by the husband.

APPEAL from an order of justices of the West Riding of Yorkshire, made under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895.

The respondent, a married woman, had applied for an order on the ground that her husband, the appellant, had on December 3, 1895, been guilty of wilful neglect to provide reasonable maintenance for her. The parties had lived together from 1883 to 1891, since which year the appellant had not maintained, or helped to maintain, his wife; it was alleged that he had disposed of all his household effects to his daughter, who lived with him, and that the house was taken in the daughter's name. The justices, upon the advice of their clerk, held that it was not necessary for the respondent to give any evidence of the appellant's means; that, being satisfied as to the fact of the neglect, they were bound to make the order, and that the appellant could afterwards shew that he had no means. The justices accordingly made an order for five shillings a week, and the husband appealed.

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(1) 2 Hagg. App. 161.

March 3. *C. E. Jones*, for the appellant. The justices took an erroneous view of the law. It was necessary that they should have before them some evidence of the ability of the appellant to provide reasonable maintenance for his wife at the date mentioned in the summons, for by s. 9 payment of money directed to be paid under the Act may be enforced in the same manner as in the case of an affiliation order, and the appellant is therefore, by virtue of 35 & 36 Vict. c. 65, s. 4, and the Summary Jurisdiction Acts, under a liability to be imprisoned for a period not exceeding three months. Moreover, it is apparent from s. 5, sub-s. (*c*), of the Act, that the justices must have evidence of means before them, for that sub-section enables them to order payment of such weekly sum not exceeding two pounds as the Court shall, "having regard to the means both of the husband and wife," consider reasonable. The affidavits shew that the appellant had no means.

H. T. Waddy, for the respondent. It is unnecessary to shew actual means. Moreover, the justices have exercised their discretion after hearing the appellant; assuming, as may be fairly done, that they declined to credit his evidence and thought he was capable of earning a livelihood, there was abundant evidence of his having neglected to maintain the respondent. The appellant has a remedy under s. 7 of the Act, which gives him power to apply to the justices to alter, vary or discharge the order.

SIR F. H. JEUNE, PRESIDENT. It is not clear what view the justices took in this case, for the defendant was called as a witness, and they had therefore before them some evidence of his means; but there can be no doubt that they acted upon an erroneous view of the law, and I think that they never had the real point before them, and therefore did not apply their minds to the real issue. Two points are urged before us for the appellant: the first raises the question whether on December 3, 1895, the appellant was guilty of wilful neglect to provide reasonable maintenance for the respondent; if that is made out, then the jurisdiction of the justices arises to give relief in any of the modes specified in s. 5 of the Act. But they had to be satisfied of that fact, and it was not sufficient to shew that the respondent had been guilty of the offence years before, for the charge is of an offence on a specific date. Now, if the justices had applied their minds to this question, it would be difficult to disturb their decision; but they were advised by their clerk that it was not necessary for the prosecution to shew that the appellant had means or the capability of earning means. It is clear, however, to my mind that, before they could find him guilty of this offence of wilfully neglecting to maintain his wife, they must be satisfied either that the appellant had actual earnings in his possession, or that he had the capability of earning money; it would, I think, be enough if he could earn money, but wilfully abstained from doing so.

The second point urged is really the same as the first, but in another form. It is said that under s. 5 (*c*) the justices may order the husband to pay to or for the wife such weekly sum, not exceeding two pounds, as the Court, having regard to the means of both parties, may think reasonable. If they are satisfied that the husband has no means, actual or potential, they cannot make an order under the section; but that is a question of fact which they ought to investigate. I think, therefore, that the case must go back to the justices for the consideration of those two points.

GORELL BARNES J. concurred.

H. T. Waddy, for the respondent, asked that, in accordance with the general practice of the Court in matrimonial suits, the costs of the wife, though unsuccessful, should be ordered to be paid by the husband.

C. E. Jones, for the appellant, submitted that the costs should follow the event.

SIR F. H. JEUNE, PRESIDENT. This is a point of general importance, upon which we reserve our judgment.

Cur. adv. vult.

May 5. SIR F. H. JEUNE, PRESIDENT. In this case the wife was an unsuccessful respondent to an appeal under the Summary Jurisdiction (Married Women) Act, 1895, and we reserved for consideration the question whether she was to be allowed her costs. In this Court, no doubt for the reason that the property as a rule belongs to the husband and that the wife, if unable to obtain some portion of it, would in many cases be unable to defend a matrimonial suit brought against her, there has grown up a settled practice that the wife, even if unsuccessful, is entitled to have her costs paid for her. Upon the whole, though I lay down no hard and fast rule, I think that this principle ought to have its full and proper influence when the wife is an unsuccessful respondent in appeals under this Act. There is authority for that view in the Court of Appeal, where that principle was applied in *Otway* v. *Otway* (1), a case in which the wife was an unsuccessful respondent; and the question is very clearly and succinctly dealt with in the following passage in the judgment of Cotton L.J. (2): "Then, as regards the appeal," says that learned judge, "I doubted very much whether we ought to allow any costs of the wife on the appeal, we having decided against her on the ground that she had already been found guilty of adultery before any of the proceedings in the appeal were taken. But I think the case we have been referred to of *Holt* v. *Holt* (3) settles that question. If, after she had been

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(1) 13 P. D. 141.

(2) 13 P. D. at p. 155.

(3) 28 L. J. (P. & M.) 12.

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The President.

found guilty of adultery, she had herself actively brought the matter before this Court, then I should have thought no provision ought to be made for her costs; but here she was only defending herself against a proceeding taken by the husband, and that being so, I think that, following what is laid down in *Holt* v. *Holt* (1), it was reasonable for her to instruct a solicitor and counsel to appear. Therefore, although her adultery prevented her from pledging the credit of her husband, and prevented her getting any alimony or allowance from the husband, yet, in my opinion, it does not prevent her from requiring her husband to provide for the costs reasonably incurred in bringing her case against his appeal before the Court. Therefore I think we ought to allow her her costs of this appeal, as well as the costs of the proceedings in the Divorce Court." In the present case, therefore, I think that the wife, though an unsuccessful respondent, ought to have her costs of the appeal; but it must clearly be understood that nothing that I have said has any application to the case of a wife who is an unsuccessful appellant.

GORELL BARNES J. concurred.

Solicitors for appellant: *Jaques & Co., for Armitage, Sykes & Hinchcliffe, Huddersfield.*

Solicitors for respondent: *Learoyd, James & Mellor, for Turner, Huddersfield.*

(1) 28 L. J. (P. & M.) 12.

W. J. B.

JONES *v.* JONES.

1896
May 4, 15.

Divorce—Practice—Co-Respondent—Necessity for making a Person co-Respondent—Inability to Prove Adultery—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *ss.* 28, 33.

Where the relief sought by the petitioner is on the ground of adultery alleged to have been committed with a man, who is alive, and whose name and identity are known, the petitioner must make that person a co-respondent; and the Court ought not to excuse him from so doing, merely because he finds that he cannot obtain evidence which will prove his case as against that co-respondent.

So *held*, by Gorell Barnes J., with the assent of Sir F. Jeune, President.

Application for leave to proceed without making a co-respondent. The facts are stated in the judgment.

Priestley, for the petitioner, cited *Jinkings* v. *Jinkings* (1), *Gill* v. *Gill* (2), and *Payne* v. *Payne, Rodway and Eddels.* (3)

Cur. adv. vult.

Gorell Barnes J. In this case the petitioner seeks for the dissolution of his marriage with his wife, the respondent, on the ground of her adultery. In his petition he alleges that his wife committed adultery with some man whose name is at present unknown to him, in consequence whereof she was delivered of a child of which the petitioner was not the father.

An application is now made to me for leave to proceed without making a co-respondent. The 28th section of the Matrimonial Causes Act, 1857, provides that "upon any petition for dissolution of marriage presented by a husband, the petitioner shall make the alleged adulterer a co-respondent to the said petition, unless on special grounds, to be allowed by the Court, he shall be excused from so doing." It has been held in the cases of *Tollemache* v. *Tollemache* (4) and *Pitt* v. *Pitt* (5) that,

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(1) L. R. 1 P. & D. 330.
(2) 60 L. T. (N.S.) 712.
(3) 60 L. T. (N.S.) 238.
(4) 28 L. J. (N.S.) (P. & M.) 2.
(5) L. R. 1 P. & D. 464.

1896

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Gorell Barnes J.

when a petition alleges adultery with a person unknown, and names no adulterer, it is necessary to obtain the leave of the Court to proceed without making a co-respondent. In the latter case Lord Penzance said: "I think, that where a petition alleges adultery, there is an 'alleged adulterer' within the meaning of the 28th section of 20 & 21 Vict. c. 85, and therefore that it is necessary to apply for leave to proceed without making a co-respondent, although the alleged adulterer may be unknown." These cases have always been followed, and the present application was therefore made to me. At the hearing it appeared from the affidavit of the petitioner that the respondent had stated that she had committed adultery with two persons whose names she gave, and that one or other of them was the father of the child; but it appeared from the affidavits that the only evidence he relied on to support his petition consists of the birth of the child, the wife's confessions, and the non-access of the petitioner to the respondent.

Mr. Priestley, for the petitioner, argued that the petitioner should be allowed to proceed without making the persons whose names were given by the wife co-respondents, as he had no evidence against them and ought not to be compelled to proceed against them at the risk of having to pay their costs at the hearing. There have been several cases in which similar applications have been made under circumstances substantially the same as those of the present case, in some of which the application was granted, while in others it was refused. I reserved my judgment in order to examine these cases, and to arrive at a conclusion as to the rule which ought to be adopted in all similar cases.

The following are the reported cases upon the point:—

1858. *Hook* v. *Hook*. (1)—Sir Cresswell Cresswell granted an application to proceed in a suit for dissolution without making a co-respondent, on the ground that the wife was living in a brothel, and that the persons with whom the adultery had been committed were unknown. He stated that "assuming that the petitioner had some ground of suspicion, or even knowledge, as against two or three persons, he might not have sufficient evidence to prove the case against them, and so might fail in his suit."

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(1) 1 Sw. & Tr. 183.

1861. *Muspratt* v. *Muspratt*. (1)—It would seem as if Sir Cresswell Cresswell had allowed a suit to proceed, when an unknown co-respondent had been dispensed with, and the petitioner afterwards received a letter from his wife disclosing the name of the father of a child, to which she had given birth, and which she admitted was not her husband's, but the petitioner had no evidence against the adulterer.

1861. *Quicke* v. *Quicke*. (2)—The application was of the same nature as in *Hook* v. *Hook* (3), and the same learned judge required to be satisfied by affidavit that the petitioner did not know with whom adultery had been committed. The head-note says *Hook* v. *Hook* (3) was overruled, but the foot-note shews that in that case the adulterers were really unknown.

1867. *Jinkings* v. *Jinkings* (4), where the wife had been confined of an illegitimate child and confessed that one S. with whom adultery was alleged in the petition, was its father, but no evidence could be obtained of any intimacy between them, Lord Penzance granted leave to proceed without making S a co-respondent, saying that he thought that, "if a petitioner cannot obtain any evidence against a person with whom a respondent confesses that she has committed adultery, he ought not to be obliged to make that person a co-respondent."

1888. *Payne* v. *Payne, Rodway and Eddels* (5) was a similar case, and, although *Jinkings* v. *Jinkings* (4) was cited to him, Butt J. refused to grant the application to dispense with a co-respondent.

1888. The next case before the same learned judge was *Gill* v. *Gill*. (6) It was a similar case to the last, but he acted upon *Jinkings* v. *Jinkings* (4), and granted the application, though he stated that he did so with considerable reluctance. His previous decision in *Payne* v. *Payne, Rodway and Eddels* (5), was not cited to him.

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(1) 31 L. J. (N.S.) (P. M. & A.) 28.
(2) 31 L. J. (N.S.) (P. M. & A.) 28.
(3) 1 Sw. & Tr. 183.
(4) L. R. 1 P. & D. 330.
(5) 60 L. T. (N.S.) 238.
(6) 60 L. T. (N.S.) 712.

1890. *Cornish* v. *Cornish* (1) was the next case, and then the same learned judge refused a similar application, and said that the fact that the petitioner had no evidence, except the wife's confessions, did not dispense with the necessity for making a co-respondent.

In *Bagot* v. *Bagot* (2), decided also in 1890, Lord Hannen followed *Jinkings* v. *Jinkings* (3); but in *Miles* v. *Miles* (4), decided in 1896, the President refused leave to proceed without a co-respondent where such leave had at first been obtained, and the wife had subsequently written a letter to the petitioner mentioning the name of an existing person with whom she had misconducted herself, but against whom the petitioner had no evidence.

In *Carryer* v. *Carryer and Watson* (5), decided in 1865 before *Jinkings* v. *Jinkings* (3), the question before me was considered at some length. A motion was made to excuse the petitioner from making one M, with whom adultery was alleged to have been committed, a co-respondent. M was abroad, and the petitioner had only certain letters and diaries of the respondent which might make a case against her, but not against M. Lord Penzance said: "If that" (i.e., that there was evidence against the respondent, but none against M) "had been clearly made out, I am not disposed to say that the Court would not have relieved the petitioner from making him a co-respondent. On the other hand, I do not intend at once to decide that the Court would do so. It is rather difficult to ascertain with certainty what was the motive of the Legislature in requiring that the alleged adulterer should be made a co-respondent. There may have been several motives. First, it may have been intended that any man, against whom adultery is charged, should have a citation served on him in order that he may, if he like, appear and defend his character. In that view of the case, the enactment would be intended for his benefit. Another motive may have been that it would be desirable on behalf of the public, who are interested in not having divorces lightly granted, that there should be a party to the suit who should be interested in disproving the charge of adultery, quite independently of the petitioner's interest in the matter, and his right to get costs. So that the mere fact of want of evidence against the alleged adulterer might not in all cases be a sufficient reason for dispensing with a co-respondent. In this case I am by no means satisfied that the petitioner could not get evidence against M; I, therefore, reject the application to relieve him from the necessity of making the alleged adulterer a co-respondent."

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(1) 15 P. D. 131.

(2) 62 L. T. (N.S.) 612.

(3) L. R. 1 P. & D. 330.

(4) *The Times*, March 20, 1896.

(5) 34 L. J. (N.S.) (P. M. & A.) 47.

The argument for the petitioner is that it is a hardship to compel him to make a person a co-respondent where the petitioner has evidence against his wife, but not against the co-respondent with whom it is alleged she has committed adultery, because he will run the risk of having to pay the co-respondent's costs. But it is to be observed that the 28th section forces the petitioner to sue a person, against whom he asks no relief, unless he claims damages under the 33rd section, and it is obvious that the 28th section was not passed in the interest of petitioners. It is important that the co-respondent who is charged with adultery should be able to appear and defend his character, if he think fit. On a wife's petition power is given to the Court to order the person, with whom the husband is alleged to have committed adultery, to be made a respondent. It is also highly desirable that the Court should have before it the persons charged with adultery, in order to assist it in arriving at the truth as to the petitioner's case. It not unfrequently happens that a co-respondent appears and contests a suit which the wife does not defend, and in some of these cases the co-respondent has succeeded in obtaining a decision in his favour. Divorce cases differ essentially from ordinary litigation between parties. The interests of the petitioner and respondent are not all that the Court has to consider. The person or persons, with whom the respondent is alleged to have contracted a guilty relationship, require their interests to be watched over, and in the public interest collusion between the parties, connivance, and other matters have to be carefully guarded against; and the presence of parties whose interests conflict with the petitioner's may assist the Court in dealing with those matters. These larger

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considerations, in my opinion, outweigh the suggested hardship on the petitioner. I am of opinion that, where the relief sought against the respondent is on the ground of adultery alleged to have been committed with a man, whose name and identity are known, and who is alive, the petitioner must make such person a co-respondent, and that the Court ought not to excuse him from so doing, merely because he finds that he cannot obtain evidence, which will prove his case as against such co-respondent.

As it is desirable that the Court should act with uniformity on this point, I have asked the President to read this judgment, and he authorizes me to say that he regards it as in accordance with the decisions he has himself given when similar cases have been before him.

I may add that I am not at all satisfied upon the affidavits that the petitioner in the present case cannot get any evidence against the co-respondents. He does not say in plain terms that he cannot. The motion must be refused.

Solicitors: *Field, Roscoe & Co.*

H. D. W.

CRAIG *v.* CRAIG AND HAMP.

1896
April 20;
May 4.

Divorce—Practice—Sequestration—Right of Sequestrators—Money held by third Person, not party to the Action—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 52.

The right of sequestrators to attach moneys, alleged to be held by third persons for the judgment debtor, but denied by them to be so held, cannot be determined upon a motion in a suit to which the third persons are not parties, unless they appear and submit to the jurisdiction of the Court.

A co-respondent in a divorce suit not having paid the damages assessed against him by the jury, a writ of sequestration was issued against his property, in pursuance of which the sequestrators applied by a motion in the suit for an order calling upon the trustees of his marriage settlement to pay into court any moneys in their hands belonging to him. The trustees disputed their liability to the co-respondent, and the jurisdiction of the Court to make the order:—

Held, that, as the trustees were not parties to the suit, and disputed their liability to the co-respondent, and the jurisdiction of the Court, the Court had no power to make the order on motion in the suit.

Motion before Gorell Barnes J.

The facts are stated in the judgment of the Court.

Bayford, *Q.C.*, and *Whinney*, for the sequestrators.

Inderwick, *Q.C.*, and *C. Lyttelton Chubb*, for the trustees.

Cur. adv. vult.

Gorell Barnes J. In this case the petitioner, on March 11, 1892, obtained a decree nisi against the respondent for the dissolution of his marriage with her on the ground of her adultery with the co-respondent, and the co-respondent was ordered within fourteen days to pay to the petitioner the sum of 50*l.* damages assessed by the jury. On November 8, 1892, the said decree was made absolute. The said sum of 50*l.* was not paid by the co-respondent, and, on March 27, 1896, a writ of sequestration was issued against his property.

On April 1, 1896, it was ordered by the President, on the ex parte application of the sequestrators, that "James Edward

Wilkin and Charles Josiah Etherington, the trustees of an indenture of settlement dated 10 February, 1887, do verify by affidavit the funds or sums due or to accrue due to the co-respondent Horatio Hamp in their hands, and that they be restrained, until after the 20th day of April 1896, or further order, from paying the same or any part thereof either to the said co-respondent, or on his account, and that, unless cause be shewn on 20 April 1896, the said sums due or to become due be paid into Court." The time for shewing cause was extended to April 27, and on that day the case was argued before me, when two points were raised on behalf of the trustees of the settlement: first, that the Court had no power to make an order against them in this suit on motion, and secondly that, according to the terms of the settlement, and in the events which had happened, the trustees could not be compelled to pay any moneys to or for the co-respondent in discharge of liabilities contracted or incurred by him.

The trustees are trustees under an indenture dated February 10, 1887, made between the co-respondent and trustees, in pursuance of the "Hamp's Estate Act, 1868," and certain orders in Chancery, by which the trustees were to stand possessed of certain funds upon certain trusts for the benefit of the co-respondent, for his wife, and for his children, and, in default of children, as in the indenture declared, and the indenture contained certain powers and provisions, and amongst them a provision upon which the trustees relied in support of the second point above mentioned.

It was admitted that the trustees have in hand at the present time 21*l*. 14*s*. 1*d*. representing income of the said trust funds, and that sums would be received by them from time to time in respect of income from the said trust funds. The co-respondent was married in December, 1892.

The attempt is made by this motion, in a suit to which the trustees are not parties, to compel them to pay to the sequestrators 50*l*. out of the income, which it is alleged that the co-respondent should receive under the settlement. The trustees allege that, under the circumstances which have happened, the co-respondent is not entitled to receive any money from them, and they dispute the right of the sequestrators to proceed against them.

No argument in support of the application of the sequestrators on principle was addressed to me, but some of the cases which I will cite or refer to were mentioned.

If there had been no cases in which the subject had been considered, I should have been of opinion that, upon principle, the right of sequestrators to attach moneys, alleged to be held by third persons for the judgment debtor, but denied by them to be so held, could not be determined upon a motion in a suit to which the third persons were not parties, unless they appeared and submitted to the jurisdiction of the Court. Such third persons are entitled to have their liability determined in the usual way in which it would be dealt with, i.e. in an action.

But the matter has been considered in many cases. In the year 1827 the case of *Johnson* v. *Chippindall* (1) came before Shadwell V.-C. All the earlier cases were carefully examined and discussed in argument, and amongst them *Francklyn* v. *Colhoun* (2), where the debt seems to have been admitted, and an order was made partly in a certain interpleader action (3); and *Simmonds* v. *Lord Kinnaird* (4), where a bill for discovery and account against bankers, who were alleged to have moneys of the plaintiff's debtor in their hands, was filed and argued on demurrer. In his judgment the Vice-Chancellor said (5): "I find no instance in which the Court has compelled a third party to pay in a chose in action, without a bill, where any resistance has been made by the holder of the chose in action. The old cases are collected in the notes to *Francklyn* v. *Colhoun*; but in none of them does it appear that any resistance was made."

After that date there are the following cases:—

1. *Wilson* v. *Metcalfe* (6), where the third person admitted a debt, but having paid it to the debtor without an order was not compelled to pay it over again to the sequestrators, and consented to pay to them moneys to become due subsequently to the debtor.

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(1) 2 Sim. 55.

(2) 3 Swanst. 276.

(3) 2 Sim. 60, note (i).

(4) 4 Ves. 735.

(5) 2 Sim. 55, at p. 64.

(6) 1 Beav. 263.

2. *Crispin* v. *Cumano* (1), where it was held that the Court of Probate had no authority to make an order upon the Bank of England, without their assent, to pay over to the sequestrators dividends due to the judgment debtor, and Lord Penzance said: "The question therefore arises whether an adverse order has ever hitherto been made in a Court of Equity on a third person, to pay over to a creditor money which he owes to the debtor. I cannot find that it has, and I must therefore, with much reluctance, refuse to make such an order."

3. *Manton* v. *Manton* (2), where it was held that an adverse order to pay money into Court could not be made against bankers not being parties to the suit, but, on their submission to the jurisdiction, a directory order was made.

4. *In re Slade. Slade* v. *Hulme* (3), where there was a motion in an administration suit to which the third persons were parties.

5. *Claydon* v. *Finch* (4), where an order was made in an action on the petition of the sequestrators for payment out of money in Court belonging to the debtor, but there was no third person to oppose.

6. *Miller* v. *Huddlestone* (5), where the bankers proceeded against admitted the debt.

I am not aware of any more recent cases; and the result is that there appears to be no case in which an order was made to enforce a sequestration against third persons, who disputed their liability to the debtor, on motion, in a suit to which they were not parties.

The present proceeding is not taken under the Rules of the Supreme Court, Order XLV., and I was not asked to consider whether that order can be used in this divorce suit to enforce proceedings against the trustees; but I may observe that under that order, if the garnishee disputes his liability to the judgment debtor, his liability is not determined on motion, but an order is made that "any issue or question necessary for determining his liability be tried or determined in any manner in which any

(1) L. R. 1 P. & D. 622.
(2) 40 L. J. (Ch.) 93.
(3) 18 Ch. D. 653.
(4) L. R. 15 Eq. 266.
(5) 22 Ch. D. 233.

cause or question in an action may be tried or determined." (Rules 3 and 4 of Order XLV.)

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I am of opinion, therefore, that the trustees are entitled to have the order of April 1 and the orders continuing that order against them discharged.

I express no opinion upon the merits of the second question raised by the trustees, which depends upon the construction of the settlement, and perhaps may have to be argued in other proceedings, possibly in the Chancery Division, where the terms of the settlement can be conveniently considered.

Solicitors for sequestrators: *F. A. K. Doyle.*

Solicitors for trustees: *Whitehouse & Etherington.*

H. D. W.

OLDROYD *v.* OLDROYD.

1896
May 2, 5, 6, 7, 8, 22.

Divorce—Restitution of Conjugal Rights—Conduct of Petitioner—"Desertion without Reasonable Cause"—Matrimonial Causes Act, 1884 (47 *&* 48 *Vict.* c. 68), *s.* 5.

By the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), s. 5, "If the respondent shall fail to comply with a decree of the Court for restitution of conjugal rights, such respondent shall thereupon be deemed to have been guilty of desertion without reasonable cause, and a suit for judicial separation may be forthwith instituted, and a sentence of judicial separation may be pronounced, although the period of two years may not have elapsed since the failure to comply with the decree for restitution of conjugal rights."

In a suit for restitution of conjugal rights brought by a second wife, it appeared that differences had arisen between her and her husband, due to her inability to agree with her stepchildren, his daughters by the former marriage, and that she had in consequence left her home, and her husband had refused to receive her back:—

Held, on consideration of the evidence, that the wife had done nothing to disentitle her to maintain a suit for desertion without reasonable cause, within the meaning of s. 5 of the Matrimonial Causes Act, 1884, as interpreted by the Court of Appeal in *Russell* v. *Russell* ([1895] P. 315), and that she was therefore entitled to a decree for restitution of conjugal rights.

PETITION of Mary Amelia Oldroyd, dated July 31, 1895, for restitution of conjugal rights with Edwin Oldroyd, to whom she had been married as his second wife in April, 1890.

The respondent by his answer admitted that he had refused to live with the petitioner, but contended that he had done so lawfully in consequence of (1) her rudeness to his daughters, (2) her bad treatment of himself, (3) her having left his house on December 10, 1894, contrary to his wishes, and having never returned. He stated that his health had suffered owing to her conduct, and that on March 26, 1895, they had agreed to live apart in consideration of a sum of money which he had paid her, and that her conduct constituted cruelty, for which he claimed by way of counter-claim a judicial separation.

The petitioner in her reply denied the truth of the allegations in the answer, and submitted that, if true, they constituted no legal defence to her petition.

Murphy, Q.C. (with him *Bargrave Deane*), for the petitioner. The petitioner is entitled to succeed. The answer and the evidence in support of it disclose no defence. The case of *Russell* v. *Russell* (1) does not alter the law as to legal cruelty; and here there was no physical violence or injury to health. The petitioner has not been guilty of "desertion without cause for two years" within the meaning of s. 16 of the Act of 1857 (2), and the Court is not entitled to consider her motive in instituting this proceeding, as her rights are defined by s. 5 of the Act of 1884. (1)

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(1) [1895] P. 315.

(2) By the Matrimonial Causes Act, 1857 (20 & 21 Vict. 85), s. 16, "A sentence of judicial separation may be obtained either by the husband or the wife, on the ground of adultery, or cruelty, or desertion without cause for two years and upwards."

By s. 27 ". . . . It shall be lawful for any wife to present a petition to the Court, praying that her marriage may be dissolved, on the ground that since the celebration thereof, her husband has been guilty of . . . . adultery coupled with desertion, without reasonable excuse, for two years or upwards."

By s. 31 ". . . . Provided always that the Court shall not be bound to pronounce such decree, if it shall find that the petitioner shall, in the opinion of the Court, have been guilty of . . . . having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse."

By the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), s. 5, "If the respondent shall fail to comply with a decree of the Court for restitution of conjugal rights, such respondent shall thereupon be deemed to have been guilty of desertion without reasonable cause, and a suit for judicial separation may be forthwith instituted, and a sentence of judicial separation may be pronounced, although the period of two years may not have elapsed since the failure to comply with the decree for the restitution of conjugal rights."

Carson, Q.C. (with him *Grazebrook*), for the respondent. The petitioner is not entitled to a decree for the restitution of conjugal rights. The 5th section of the Act of 1884 is strongly relied on by the respondent. The effect of *Russell* v. *Russell* (2) is that the wife cannot succeed unless she comes into court with clean hands. She must not have been guilty of misconduct, which, though it may not amount to a matrimonial offence, makes it impossible for her husband afterwards to live with her. In this case the petitioner has broken up the home and refused without any real provocation to do the duties of a wife. Can it be said truly that the respondent has "deserted" her "without reasonable cause"? Could she succeed in a suit for judicial separation? The dicta of Lord Herschell in *Mackenzie* v. *Mackenzie* (3) are in the respondent's favour. The appeal is also not brought bonâ fide. The petitioner does not wish to live with the respondent, but to obtain an order for permanent alimony.

Cur. adv. vult.

Gorell Barnes J. In this case the petitioner, the wife of Mr. Edwin Oldroyd, of Selborne House, Harrogate, Yorkshire, engineer, sues for restitution of conjugal rights. The respondent, by his answer, admits that he has refused to live and cohabit with the petitioner, but alleges that he has a good and sufficient and lawful ground for such refusal, as set forth in his said answer. The answer then sets forth a number of acts on the part of the petitioner which, it is contended on the respondent's behalf, amount to such conduct as to justify him in refusing to return to cohabitation with the petitioner. It also alleges that the petitioner voluntarily, without his permission, and notwithstanding his express objection, left his home on December 10, 1894, and never afterwards returned to cohabitation with him; that in consequence of the petitioner's conduct his health failed, and that it would be dangerous to his health

(1) See note 2, ante, p. 176.

(2) [1895] P. 315.

(3) [1895] A. C. 384, at p. 388.

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if she were to again live with him; and that a verbal agreement was entered into between them on or about March 26, 1896, whereby they agreed to live apart for the future in consideration of the payment by the respondent to the petitioner of the sum of 100*l*., which was duly paid to her in pursuance of the said agreement. The answer also alleges that the petitioner has been guilty of cruelty as set forth therein, which means that the acts to which I have above referred are alleged to amount to legal cruelty, and the respondent prays that he may be judicially separated from the petitioner by reason of her said cruelty.

It appears that the parties were married on April 9, 1890. The petitioner was a widow with several children, one of whom, Miss Maria Amelia Pycock, went with the petitioner to live with her and the respondent after the marriage. The respondent was a widower having three children, two of whom lived in the house after the marriage, the third having married. The petitioner and respondent appear to have known each other for many years before their marriage, and at first lived happily together. The respondent's case is that not very long after the marriage, the petitioner's conduct became, and continued, until they ceased to live together, such as to amount to cruelty towards him, or at any rate to such conduct as, under the circumstances of the case, justified him, after she left him, in refusing to return to cohabitation with her; that she voluntarily left him; and that the verbal agreement alleged in the answer was entered into. The case for the petitioner is that she had been guilty of no cruelty or conduct such as is alleged by the respondent; that she did not voluntarily leave him; and that there was no agreement between them as alleged by the respondent.

Dealing first with the question of cruelty, I think it sufficient to say that, although a great deal of evidence was given on the respondent's behalf as to what had taken place between himself and the petitioner, no case of cruelty was established against her. There is no doubt that there had been for some time before December, 1894, a great deal of friction in the lives of these two persons, principally owing to causes to which I will

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refer later on, and that frequent quarrels had taken place in their household. But I think that the account which was given on the respondent's side was coloured by a great deal of exaggeration, which is, perhaps, not unlikely to occur when a person is giving evidence relating to incidents which have taken place when a certain amount of excitement has prevailed, and especially when one party to a quarrel is giving his or her account thereof. I cannot accept this account as representing the real state of the case, and I am of opinion that there is no ground for imputing legal cruelty to the petitioner; and, although the respondent alleged that his health had suffered, I think that this was really due to his having unfortunately had an attack of influenza shortly after the petitioner and respondent had separated. I may say that possibly his illness may account for the tone of some of the letters written by the respondent in 1895.

Mr. Carson, however, contended that, even if the acts complained of by the respondent did not amount to cruelty, yet that conduct on the part of the petitioner was established of such a character as to justify the respondent in refusing to return to cohabitation, and that the Court was entitled, following the decision of the Court of Appeal in *Russell* v. *Russell* (1), to refuse to pronounce a decree for restitution of conjugal rights. He urged that the Court has power, in accordance with that decision under the 5th section of the Matrimonial Causes Act, 1884, " to refuse a decree for restitution of conjugal rights whenever the result of such a decree would be to compel the Court to treat one of the spouses as deserting the other without reasonable cause contrary to the real truth of the case"; and that, although no definition of " reasonable cause" appears to have been given in the judgment of Lopes L.J. in delivering the judgment of himself and Lindley L.J. in *Russell* v. *Russell* (1), still in that judgment Lopes L.J. refers to the Scottish case of *Mackenzie* v. *Mackenzie* (2), in which Lord Herschell, then Lord Chancellor, expressed himself as follows: " My Lords, I am not prepared, without further consideration, to assent to the proposition, that a spouse who seeks a decree of adherence is in all cases entitled to obtain it, unless a case can be established by the defender which will justify a decree of separation. It will be seen that in the view which I take, it is not necessary to determine the point in the present case, but I think it right to state the grounds upon which I desire to reserve my judgment upon it. I admit that there is authority for the proposition contended for on behalf of the appellant, but it has never yet, so far as I am aware, been canvassed either in a Court of Appeal or in this House. It seems to me open to question, whether the Courts ought in all cases to disregard the conduct of the party who invokes their aid in an action for adherence, and to decree it in all cases where a matrimonial offence cannot be established by the defender. It is certain that a spouse may, without having committed an offence which would justify a decree of separation, have so acted as to deserve the reprobation of all right-minded members of the community. Take the case of a husband who has heaped insults upon his wife, but has just stopped short at that which the law regards as sævitia or cruelty; can he, when his own misconduct has led his wife to separate herself from him, come into Court, and, avowing his misdeeds, insist that it is bound to grant him a decree of adherence? I cannot better illustrate my meaning than by referring to the case of *Paterson* v. *Russell* (1), which which was relied on by the appellant. It was determined in this House, reversing the decree of the Court of Session, that the wife was not entitled to a separation; could the husband have insisted upon a decree of adherence? Might not the Court refuse its aid to one who had so acted, and regard his conduct as a bar to his claim to relief? It is not a notion strange to our law that the Court should refuse its aid to one who does not come into it with clean hands; and, when the question arises for decision, I think it may well be considered whether the Court would be bound to entertain an action and grant relief at the suit of one whose misconduct, though falling short of a matrimonial offence, has been the primary cause of the difficulty, and has led to the refusal to adhere."

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(1) [1895] P. 315.

(2) [1895] A. C. 384, at p. 389.

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(1) 7 Bell's Apps. 337.

The proposition which Mr. Carson supported was that the Court ought not to pronounce a decree for restitution of conjugal rights where the respondent has separated himself or herself, as the case may be, from the petitioner with cause, and that cause may be conduct on the part of the petitioner which, though falling short of a matrimonial offence for which a judicial separation could be obtained by the respondent, yet renders it practically impossible, in the opinion of the Court, for the petitioner and respondent to live together.

The 16th section of the Matrimonial Causes Act, 1857, allows a judicial separation to be obtained on the ground, inter alia, "of desertion by the respondent without cause for two years and upwards." The 27th section allows a wife to obtain a divorce from her husband on the ground, inter alia, "of his adultery coupled with desertion without reasonable excuse for two years or upwards." The 31st section provides that the Court "may refuse to pronounce a decree of divorce where the petitioner has been guilty, inter alia, of having deserted or wilfully separated himself or herself from the other party before the adultery complained of and without reasonable excuse." The Act of 1884, s. 5, provides that, "if the respondent shall fail to comply with a decree of the Court for restitution of conjugal rights, such respondent shall thereupon be deemed to have been guilty of desertion without reasonable cause, and a suit for judicial separation may be forthwith instituted, and sentence of judicial separation pronounced, although the period of two years may not have elapsed since the failure to comply with the decree for restitution of conjugal rights."

In *Russell* v. *Russell* (1) the majority of the Court of Appeal held that the Act of 1884 has materially altered the old law as to restitution of conjugal rights, and has given the Court a power to refuse a decree which it had not before; that the wife's conduct in that case, though not amounting to legal cruelty, would disable her from contending that her husband's desertion was without cause, and that she would fail in a suit for judicial separation; and that, as the Act of 1884 made disobedience to a decree for restitution of conjugal rights equivalent

(1) [1895] P. 315.

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to desertion without cause, therefore by necessary implication the Court must have power to refuse a decree for restitution, "wherever the result of such decree would be to compel the Court to treat one of the spouses as deserting the other without reasonable cause contrary to the real truth of the case" (1), and they dismissed the wife's petition for restitution and the husband's counter-claim for judicial separation. I understand that this case is under appeal to the House of Lords upon the question of the husband's counter-claim.

The judgment does not define "cause" or "reasonable cause" or "reasonable excuse," which I think all mean the same thing (see per Lord Penzance in *Yeatman* v. *Yeatman* (2)); but after referring to some cases in which it was held that in a suit for restitution nothing short of a ground for separation afforded a defence to the respondent, the judgment states that if the wife had been petitioning for a judicial separation on the ground of desertion, her conduct towards her husband would disable her from contending that the desertion was without cause; and then holds that, as she would fail in a suit for judicial separation, the effect of the Act of 1884 was to empower the Court to refuse her a decree in a restitution suit.

In stating that the petitioner would have failed in a suit for judicial separation, the Lords Justices, although *Yeatman* v. *Yeatman* (2) is not mentioned in the report, seem to have substantially held the same view as that expressed by Lord Penzance in that case before the Act of 1884 with regard to suits for judicial separation on the ground of desertion; but they carry the matter further than he did by holding that the Act of 1884 has altered the law as to suits for restitution.

Lord Penzance held that conduct falling short of a matrimonial offence sufficient to found a decree for judicial separation, was still sufficient "cause" to bar the right of a petitioner to maintain a suit for judicial separation on the ground of desertion. In his judgment he said: "Now, it must be borne in mind that, according to the matrimonial law of this country, which the Divorce Acts have not affected to touch on this head, nothing will justify a man in refusing to receive his wife, except the commission of some distinct matrimonial offence, such as adultery or cruelty, upon which the Court could found a decree of judicial separation; and that in all other cases, no matter what her conduct, she can always claim a decree enforcing cohabitation. Save, then, in cases where some such a matrimonial offence has been committed, the law does not justify and support the husband in deserting and living apart from his wife. And it may be considered hardly consistent with this, to hold that any desertion can be 'reasonable' which cannot be justified by proof of such offence, or, in other words, that the law should at the same time hold the desertion of the husband to have been reasonable, and yet, if asked by the wife, decree that her husband must take her back again. The inconsistency, however, is perhaps more apparent than real. For the Legislature may have thought it right, in creating the new matrimonial offence of 'desertion,' to subject the remedy for it to the condition that the conduct of the party complaining should not have led to the result complained of; and if it should have done so, to deny all remedy for the desertion, without affirming that the parties were legally justified in living apart. However this may be, the inconsistency, if it exists, is the work of the Legislature, as interpreted by the full Court of Divorce. For in the case of *Haswell* v. *Haswell and Sanderson* (1) it was decided that conduct falling short of a matrimonial offence, sufficient to found a decree for judicial separation, was still sufficient 'cause' to bar all remedy to a wife whom her husband had deserted. By this decision I am bound to shape my course" . . . . "The 'cause' should be grave and weighty which, in the judgment of the Court, should deprive a deserted wife of her remedy for that desertion, and her right to set it up as a bar to a divorce for adultery at her husband's suit."

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(1) *Russell* v. *Russell*, [1895] P. 315, at p. 334.

(2) L. R. 1 P. & D. 489, at pp. 491, 494.

The Court of Appeal, however, does not hold that the Court is to exercise a general discretion in granting or refusing a decree of restitution. To go so far would involve a large alteration of the old law, and would confer a discretionary power on the Court of far-reaching effect and most difficult to exercise. Indeed, it was not contended before me that the decision in *Russell* v. *Russell* (1) went to this extent. The effect of that case appears to be that in cases where the conduct of the petitioner has led to desertion by the respondent, and has amounted to sufficient cause to disentitle the petitioner to maintain a suit for judicial separation on the ground of desertion, the Court is now empowered to refuse to pronounce a decree compelling the respondent to return to cohabitation with the petitioner. The truth is that in such cases it has become practically impossible for the spouses to live properly together. I may add, that there may be some little inconsistency in holding that a decree for restitution may not be pronounced, and yet that the other party cannot obtain a decree for judicial separation; but that seems to be the result of the case of *Russell* v. *Russell.* (1)

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(1) 1 Sw. & Tr. 502.

I have now to apply these observations to the present case. I am of opinion that when the whole of the evidence in this case is considered, there is nothing in the conduct of the petitioner which would approximate the case to such cases as are referred to by Lord Herschell and in *Russell* v. *Russell.* (1) In my judgment, the petitioner has not been guilty of conduct which justifies the respondent in refusing to return to cohabitation, or which can be said to render it practically impossible for the petitioner and respondent to live together. That quarrels took place, for which the petitioner was partly to blame, and that a certain amount of violent language may have occurred, is probably true. But I think that the real explanation of the differences between the petitioner and respondent is to be found in the circumstances under which they and their respective families were living together. I have no doubt that the friction between the parties was principally due to the fact that the petitioner was unable to live in agreement with the respondent's daughters by his first wife, and he and the petitioner's daughter had differences to which a letter of the respondent's, dated November 5, 1894, to some extent refers. When persons marry for a second time, each having a family of the first marriage, difficulties may arise which it may require tact and good temper to overcome. In the present case there are many facts proved or indicated in the course of the evidence which shew that the state of disagreement to which I have referred existed.

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(1) [1895] P. 315.

The petitioner left the respondent's house on December 10, 1894, although the respondent stated that he wished her to remain. He also stated in his evidence that his daughters said, "If she comes back, we shall not live with her." Mr. Kirby, the respondent's solicitor, stated that at an interview at which he was present after the separation, Mrs. Oldroyd was endeavouring to make friends with Miss Oldroyd, and seemed genuinely anxious to do so, but that Miss Oldroyd said it was impossible, and that, if her father were to allow the petitioner to come back, she (Miss Oldroyd) would have to leave. Two witnesses who were called on behalf of the petitioner, and who were friends of the family—Mr. Fawcett and Mr. Cliff—gave evidence upon this point. Mr. Fawcett said that he travelled nearly every day to Leeds with Mr. Oldroyd, whose business was in Leeds, and that, on the Saturday before Mrs. Oldroyd left the house, he first heard of any difficulty between the two parties, and that Mr. Oldroyd told him they had had some differences, mostly about the daughters, and that he gathered from him that, if it had not been for the children, there would have been no trouble; that Mr. Oldroyd said there were differences about the children, who did not agree together, and he was afraid from that that they would not be able to get on together. Mr. Cliff stated in the course of his evidence that since the separation he had often spoken to the respondent upon the subject of his taking his wife back, and that Mr. Oldroyd said he would be very pleased to take her back, but that he knew his daughters and she could not agree, and that he must look to his own daughters first, and that he loved her still.

It is not, however, necessary to look only to the vivâ voce evidence, because I find that on April 4, 1895, Mr. Oldroyd wrote a letter to his wife, after there had been some meetings between them, and after the matter had been placed in the hands of their solicitors, as follows: "Pending a final understanding between the two solicitors, I may assist you in deciding what to do with respect to providing a separate home, by informing you that my daughters will in no way consider any terms which will enable you to live under the same roof with them, and in my opinion it is no use whatever seeking an interview with them." It is true that the respondent and his daughters in their evidence placed the whole blame on the petitioner, and endeavoured to shew that there was no ground, so far as they were concerned, for any difficulty with the petitioner. But Miss Oldroyd stated in the course of her evidence that on one occasion, when there had been some disagreement, Mrs. Oldroyd said she would not take her sister's impudence, and that her sister said, "You are forced to, you cannot help it," and that Mrs. Oldroyd had often said, "There must be a change; either you or I will have to go." For weeks before December 10 the petitioner and the respondent's daughters were not on speaking terms, and on that date Mrs. Oldroyd and her daughter left the house, I think practically in consequence of a dispute which had arisen between herself and her husband, during which some sort of struggle took place between him and her daughter, after which he stated that Miss Pycock must not remain in the house.

It was, however, further alleged that Mrs. Oldroyd left her husband's house voluntarily and never intended to return, and that the present suit was merely intended for the purpose of obtaining an allowance. The result of the evidence is to satisfy me that Mrs. Oldroyd did not intend a final separation between herself and her husband, but desired that an opportunity should be given of arranging the household upon a basis which would be more satisfactory to herself and her husband, and that her principal object at the moment in going away was to arrange for her own daughter's residence in consequence of the disturbance about her to which I have referred. After she left meetings took place between herself and the respondent and their solicitors, with the object, in my opinion, so far as the petitioner was concerned, of bringing about a reconciliation. She stated that at one of these meetings he said that he hoped things would be better, that it was the girls and not himself, and that she might rest assured nothing should occur again, and that they were reconciled, and that he said nothing would please him better than to take her and her daughter back again. Her solicitor, Mr. Lupton, stated that he was instructed on her behalf to take every step in his power to bring about a reconciliation, that the respondent's solicitor stated that the respondent might consider making his wife an allowance, but that he (Mr. Lupton) said, "I don't want to say anything about an allowance. I am here to bring them together. It is all a storm in a teapot." The respondent's solicitor admitted that Mr. Lupton told him that he was anxious for a reconciliation, and that his instructions were to endeavour to bring it about; and when I further consider the respondent's own evidence and the petitioner's, I have little doubt that a reconciliation would have taken place had not it have been for the difficulty connected with the two families, to which I have already referred.

It was argued for the respondent that, even if the cause of the trouble between him and the petitioner was to be found in the difficulty created by the presence of his daughters, he was not bound to send them away; but the respondent would seem to have misconceived his obligations. His first duty is towards his wife. She and he are compelled to live their lives together, and it is his duty so to control and arrange his household that he and his wife may lead their lives in peace. The respondent stated that he was always fond of his wife and is fond of her still. She stated that she was anxious and is still anxious to go back to him, and in all probability if the causes for disagreement, which have existed, had been firmly dealt with by the respondent, this litigation would not have occurred. The respondent stated that if a decree were made against him he would obey it. The function of the Court is only to determine the rights and liabilities of the parties; but perhaps I may be permitted to express a hope that, notwithstanding the ordeal which he and the petitioner have gone through in this trial, they will wisely endeavour to forget their past troubles and to live in happiness together in future, and that the respondent will take such steps as may be necessary to render this possible.

With regard to the suggested defence of an agreement to live separate, I am of opinion that no such agreement as alleged by the respondent was made. The whole conduct of the parties and the whole of the correspondence appear to me to be inconsistent with any such agreement having been come to. From what I have already said it will be seen that, in my opinion, there is nothing in the suggestion that this suit is not brought bonâ fide.

I must pronounce that the petitioner is entitled to her decree for the restitution of conjugal rights, and that the cross-claim by the respondent for a judicial separation fails. The petitioner must have her costs.

Solicitors for petitioner: *Patersons, Snow, Bloxam & Kinder, for Lupton & Fawcett, Leeds.*

Solicitors for respondent: *Vincent & Vincent, for John Bowling & Son, Leeds.*

H. D. W.

1896
March 3, 31;
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HEARD *v.* HEARD.

Husband and Wife—Desertion—Limitation of Time for Proceedings—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *s.* 4—11 & 12 *Vict. c.* 43, *s.* 11.

For the purpose of proceedings under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, the desertion of a married woman by her husband is a continuing act; an application by the wife for an order under that section need not, therefore, be made within six months of the commencement of the desertion.

APPEAL from the decision of justices of Great Torrington, in the county of Devon, dismissing an application under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, on the ground of want of jurisdiction.

The appellant, a married woman, had applied for an order against the respondent, her husband, on the ground of desertion. The desertion was alleged to have commenced in 1880, but admittedly commenced more than six months before the summons was taken out or the Act came into operation. The justices, being of opinion that the application must be made within six months of the commencement of the desertion, held that they had no jurisdiction to hear the case. The wife appealed.

March 3, 31. *Beddall*, for the appellant. The justices were wrong. It is true that s. 8 of the Act of 1895 provides that all applications under the Act are to be made in accordance with the Summary Jurisdiction Acts, and that the limit of six calendar months imposed by 11 & 12 Vict. c. 43, s. 11, for the laying of a complaint or information is, therefore, primâ facie incorporated. But the answer to that objection is that desertion is a continuing act, and that the six months are not to be calculated from the commencement of the desertion; in other words, that the application need not be made within six months of the commencement of the desertion. In *Cargill* v. *Cargill* (1) Sir Cresswell Cresswell clearly considered that desertion might be a continuing act, for he held that, in order to entitle a married woman to a protection order under s. 21 of the Divorce Act, 1857, desertion must continue up to the date of the order. If the justices are right, no wife who was deserted before July 1, 1895, has any remedy at all under the Act, although the Act has been held to be retrospective. Desertion may be considered as being less a criminal offence than a breach of the marriage contract, which the husband continues to break each day that the desertion continues.

Duke, for the respondent. The justices had no jurisdiction, for desertion is not a continuing offence. The intention of s. 4 is that in administering this statute distinct acts are to be regarded, and the act of desertion which gives rise to the jurisdiction is the leaving of the wife by the husband, which must be within six calendar months of the commencement of the summary proceedings. In *Reeve* v. *Yeates* (2), where a husband was charged under 5 Geo. 4, c. 83, s. 4, with running away and leaving his wife and children, whereby they became chargeable to the parish, it was held that the six months began to run from the date of the chargeability; but chargeability and desertion are equally continuing states of fact, and the decision in that case goes to shew that the six months begin to run in the present case from the date of the desertion—that is, of its commencement. [He also cited *East London Waterworks Co.* v. *Charles* (1); *London County Council* v. *Worley*. (2)]

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(1) 1 Sw. & Tr. 235.

(2) 1 H. & C. 435; 31 L. J. (M.C.) 241.

[SIR F. H. JEUNE, PRESIDENT, referred to *Reg.* v. *Evans*. (3)]

Cur. adv. vult.

May 5. SIR F. H. JEUNE, PRESIDENT. In this case the husband left the wife more than six months before the summons was taken out against him, and the question is whether in consequence the proceeding is barred by the limitation of time imposed by the Summary Jurisdiction Acts, in accordance with which applications under the Summary Jurisdiction (Married Women) Act, 1895, must be made; or, in other words, whether desertion is a continuing act within the meaning of s. 4 of the last-mentioned Act. It is quite true that the desertion of a wife by her husband—that is to say, his leaving her against her will, with the intention of not returning—may be considered as an act complete in itself. But it is equally true that, so long as a husband remains absent, he continues to desert his wife, and desertion may in this way be considered as a continuing act. We find, therefore, that conduct akin to desertion has, according to the intent of the Act dealing with it, been regarded in both these aspects. In the case of *Reeve* v. *Yeates* (4) the offence under 5 Geo. 4, c. 83, s. 4, of a person running away and leaving his wife so that she becomes chargeable to the parish was held to be barred by lapse of time reckoned from the period that the chargeability occurred. But in *Reg.* v. *Evans* (5) a person was held to have "ceased to reside in England," not reckoning as from the time of his leaving England, but as during the whole time of his absence. In the present case it appears to me that the intention of the statute in question points clearly to desertion being considered as a continuing offence. In *Wilkinson* v. *Wilkinson* (6) Lord Coleridge C.J. and Day J. clearly considered desertion, under

(1) [1894] 2 Q. B. 730.
(2) [1894] 2 Q. B. 826.
(3) [1896] 1 Q. B. 228.
(4) 1 H. & C. 435; 31 L. J. (M.C.) 241.
(5) [1896] 1 Q. B. 228.
(6) 58 J. P. 415.

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the Married Women (Maintenance in Case of Desertion) Act, 1886, not to be a specific act, but a continuing course of conduct. In *Cargill* v. *Cargill* (1) Sir Cresswell Cresswell held that desertion must be continued up to the time of an order being sought for under the provisions of s. 21 of the Divorce Act. The learned judge, therefore, clearly considered that desertion was a continuing act within the meaning of that section. I think, too, that the sections of the Divorce Act which make the right to a judicial separation or dissolution of marriage depend on desertion for two years or upwards must be considered as regarding desertion as a course of conduct, or continuous act. It appears to me reasonable to attribute to desertion in the statute with which we are dealing the same meaning as it bears in the Divorce Acts; and I can see no reason why the wife should be deprived of a remedy against her husband who continues to absent himself from her, because such misconduct of his began more than six months before her complaint. I think, therefore, that this appeal must be allowed with costs, and this case be remitted to the justices for decision.

GORELL BARNES J. I entirely agree with the judgment of the President.

Solicitor for appellant: *H. D. Booth, for Doe & Lowman, Great Torrington.*

Solicitors for respondent: *Church, Rendell & Todd, for Seldon, Barnstaple.*

W. J. B.

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(1) 1 Sw. & Tr. 235.

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May 5.

[IN THE COURT OF APPEAL.]

THE EMERALD—THE GRETA HOLME.

Admiralty—Damage by Collision—Wreck—Expenses of Raising—Basis of Calculation—Remoteness of Damage—The Mersey Docks Act, 1874 (37 *&* 38 *Vict. c. xxx.*), *s.* 11.

The Mersey Docks and Harbour Board are by statute (37 & 38 Vict. c. xxx.) the conservancy authority of the port of Liverpool, and may (by s. 11) raise any wreck, sell it, and out of the proceeds retain the expenses.

A lightship and a dredger, the property of the Board, were sunk by the negligence of those in charge of the defendants' vessels, and the Board, having raised the wrecks, sued the defendants for the damages sustained:—

Held, by the Court of Appeal (Lord Esher M.R., A. L. Smith and Rigby L.JJ.), that in respect of raising the wrecks, the Board were entitled to recover from the defendants such an amount as represented the cost of the apparatus necessarily used on the particular occasion and provided by the Board for such purposes, such cost comprising interest upon the capital invested in the apparatus, repairs, a depreciation fund, and the insurance of the apparatus against risk.

The Harrington (13 P. D. 48) approved.

The Board claimed 1500*l.* damages for the loss of the use of the dredger during the fifteen weeks she was under repair, alleging that she might have been let at the rate of 100*l.* a week after completing the work upon which she was engaged at the time of the collision.

Held, that the damages were too remote to be recovered.

APPEAL by the Mersey Docks and Harbour Board against two orders of the President (Sir F. H. Jeune) confirming reports of the registrar after references in two actions of damage by collision in which the Board were plaintiffs, as owners of two vessels sunk by the negligence of the defendants' servants.

The two appeals were for convenience heard together, the same question being involved in each, namely, on what basis the expense incurred by the Board in raising the vessels was to be estimated.

The Mersey Docks and Harbour Board are a body of public trustees constituted and regulated by statute, and are the owners of docks in the port of Liverpool in respect of which they receive rates from ships and goods. They are also constituted by statute the conservancy authority of the port of Liverpool, and as such are entitled to receive revenues levied from ships

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entering the port, which are independent of the revenues received by them as dock-owners, and are carried to a separate account. These revenues are chiefly based on the harbour rates for the time being in force in the port, and those harbour rates may from time to time be lowered or raised by them, but they may not be raised so as, with the other receipts applicable to the conservancy accounts, to be higher than is necessary for the purposes of conservancy expenditure.

As conservancy authority the plaintiffs have, amongst other things, to maintain lightships in the sea channels leading into the port. They may also remove or destroy any vessels which may be sunk in the channels so as to be an obstruction to navigation. (1)

For the purpose of maintaining the lightship service the plaintiffs have six lightships for the four stations on which they require to keep such vessels, it being found prudent to keep two more vessels than those actually on station at any one time.

For the purpose of removing or destroying sunken wrecks the plaintiffs have provided suitable plant, including vessels called "lumps" and "camels," maintained by the plaintiffs for the purpose of wreck-raising only, and tugs provided and maintained partly for that work and partly for doing other conservancy work in the port.

On March 6, 1895, the steamship *Greta Holme*, owned by the defendants in that action, ran into and sank the steam sand

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(1) 37 & 38 Vict. c. xxx.

Sect. 11: ". . . . the (Mersey Docks and Harbour) Board may raise, destroy, or remove any wrecks of vessels, or any vessels that may have been or shall hereafter be sunk or stranded in any dock or elsewhere within the port of Liverpool, or any of the sea channels leading thereto, and which shall be in their judgment an obstruction to the safe and convenient navigation or use thereof, and may also raise, destroy, or remove any cargo or part of any cargo of any such vessel or wreck . . . . and the Board may sell in such manner as they may think proper the said vessel or wreck and cargo or other matter or thing so raised or removed . . . . and out of the proceeds of such sale, which when arising from any vessel, wreck or property saved therefrom, and from the cargo of such vessel or wreck, shall be regarded as a common fund for that purpose, may retain the expenses of raising, destroying, or removing such vessel or wreck and the cargo or any part of the cargo thereof . . . . together with the expenses of detainer and sale, rendering the overplus (if any) to the person or persons entitled to the same. . . ."

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pump dredger No. 7 belonging to the Board. This was not an ordinary bucket dredger employed to keep the channels open, but was fitted with a suction apparatus for raising and removing sand, so as to effect improvements in the harbour area. At the time in question it was being used to deepen the channel opposite the Prince's landing-stage, and it was alleged that, from the absence of the dredger, some of this work had to be done over again.

The Board as plaintiffs were successful in their action against the *Greta Holme*, she being found alone to blame, and the decision was affirmed by the Court of Appeal.

On May 6, 1895, the steamship *Emerald*, owned by the defendants in the other action, ran into the lightship *Comet*, belonging to the plaintiff board, and stationed in the Crosby Channel. The next morning the *Comet* sank, and the Board had to place another lightship, the *Orion*, on her station.

The defendants admitted that the collision was due to the negligent navigation of the *Emerald*, but pleaded compulsory pilotage, and alleged that the lightship had been improperly allowed to sink in deep water. Ultimately it was agreed that the defendants should pay four-fifths of the damages sustained by the plaintiffs.

In the action against the *Greta Holme* the plaintiffs' claim for damages amounted to 5994*l.* 3*s.* 4*d.*; but on the reference to the registrar, assisted by merchants, only 3691*l.* 14*s.* 3*d.* was allowed, the items for watching, raising, and beaching the wreck having been reduced, and items amounting to 1591*l.* 8*s.* 6*d.* in the nature of demurrage for the loss of the use of the dredger disallowed. The reasons given by the learned registrar for these reductions were as follows: "The Board employed two 'lumps' and two 'camels' of their own for the actual lifting of the wreck (of the dredger) and several tugs, some owned by the Board, and others hired for the occasion. We did not consider that the number of craft employed was excessive, but have dealt with the charges made for them . . . . by allowing in full the sums paid for the hired tugs, as being in accordance with the published rates, but reducing to some extent the sums charged for the Board's own vessels to a rate proportionate to their admitted value. This way of dealing with the charges seems to be justified by Sir James Hannen's decision in *The Harrington.* (1)" As to the claim of 1591*l.* 8*s.* 6*d.*, made up of 1500*l.*, at the rate of 100*l.* a week for the loss of the use of the dredger during fifteen weeks from the date of the collision until the repairs were completed, and 91*l.* 8*s.* 6*d.*, at the rate of 40*l.* a week for a further period of sixteen days during which the dredger was employed as a carrying hopper, pending the completion of her machinery, the learned registrar said: "The Harbour or Conservancy Board are clearly not in the position of a trading company which is entitled to claim for loss of profit, and although their dredging operations were no doubt delayed by the disabling of this dredger, it does not appear to us that the plaintiffs have sustained any tangible pecuniary loss. This part of the claim has, therefore, been disallowed, in accordance with the conclusion arrived at by Sir James Hannen in *The Rutland.* (2)"

In the action against the *Emerald*, the claim of the plaintiffs amounted to 1980*l.* 17*s.* 1*d.*; but on the reference to the registrar, assisted by merchants, only 1535*l.* 16*s.* was allowed (of which 80 per cent. amounted to 1228*l.* 12*s.* 10*d.*), the items for raising

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(1) 13 P. D. 48.

(2) In *The Rutland* (*Shipping Gazette*, December 6, 1886) Sir James Hannen disallowed a claim of the harbour authorities at Warkworth for the loss of the use of a dredger damaged by collision, saying that "The circumstances of the case are peculiar, quite different to that of an ordinary ship. The dredger is an instrument employed by the harbour authorities, not for the purpose of gain, but for making their harbour good and convenient, so that it may attract vessels of greater draught than could enter it unless they made use of this apparatus. It is not therefore like a ship which is built for the purpose of being employed on voyages, and which, if damage is done to it, is entitled to compensation for being unable to earn freight. There is no such prospect in this case, and it must be looked at purely from this point of view: What damage capable of being estimated in money have the harbour authorities suffered from this dredger being disabled? The registrar has come to the conclusion that no tangible damage has been done to the owners of the dredger. None of the things that were sought to have been established have been established, as, for instance, that the dredger could have been let out to anybody else during the time it was under repair" . . . (nor does it appear) "how much work had to be done over again (the evidence) gives nothing upon which the registrar could form any conjecture as to what would be proper compensation."

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and beaching the lightship having been reduced, an item of 175*l.* for the wear and tear of the *Orion* whilst on the Crosby station, and a sum of 16*l.* 18*s.*, the wages of seamen whilst engaged on temporary repairs of the *Comet*, disallowed. The reasons given by the learned registrar for these reductions were as follows:—

A question was raised "whether the plaintiffs, as the Conservancy Commissioners of the Mersey, were entitled to the charges made by them for steamers hired to aid in raising and towing the *Comet*, and for the use of their own steamers and other plant for the same purpose. As regards the vessels hired for the occasion, we considered that the Board was entitled to recover the amounts paid by them which were in accordance with the established rates on the Mersey, and that no more vessels had been engaged than were required for such a service. As regards the Board's own plant, Sir James Hannen's judgment in *The Harrington* (1) . . . . is an authority for taking into account the outlay incurred by the conservators in providing and maintaining the necessary apparatus for raising and removing wrecks; but the charges allowed in that case did not include anything in the nature of profit, but were based on a moderate rate of interest on the capital value of the plant employed during the time of its employment. It was not alleged, either in that or in the present case, that the Board had occasion to provide other steamers or plant to take the place of those used in raising and removing the wreck. I have, therefore, whilst allowing the actual disbursements in full, reduced to some extent the charges made by the board for the use of their own property. A claim for 175*l.* for wear and tear of the *Orion*, the light-vessel which was substituted for the *Comet* whilst under repair, was disallowed, being equivalent only to what would have been the probable wear and tear of the *Comet* if she had continued at her station."

"It was sought to draw a distinction between the Mersey Dock and Harbour Board and the Thames Conservancy, inasmuch as the Mersey Board has not, like the Thames Conservancy, any clause in their Acts empowering them to recover

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from the owners of a sunken vessel any balance of charges and expenses which the proceeds of the wreck, if sold, may be insufficient to meet; so that the commissioners are limited to their common law rights of action against the person who has caused the obstruction. But the interpretation put by the Court in the case of *The Harrington* (1), on the charges and expenses recoverable in such cases by the Thames Conservancy, seems to supply a measure of the damage recoverable, apart from any statutory right, by the Mersey Commissioners from the parties liable for the sinking of the vessel."

The plaintiffs appealed to the President (Sir F. H. Jeune) in respect of the reduction and disallowance of the items in question. The learned President, on the ground that the registrar had taken the right view of the law and applied it to the facts, affirmed both reports, except that in the case of the *Emerald* he allowed the sum of 16*l.* 18*s.* for wages, on the ground that the seamen were taken off other work and put to the special work connected with the temporary repairs of the *Comet.*

On the question of the claim in the action against the *Greta Holme* for 1500*l.* in the nature of demurrage for the loss of the use of the steam sand pump dredger, the learned President said:—

"It was argued that in this case the evidence as to letting differs from that in *The Rutland.* (2) In that case there was apparently no evidence before the registrar that the dredger would have been let. In the present instance it was, I think, shewn that if the Mersey Board did not themselves require the services of this dredger, they could let her for considerable sums. . . . But it would seem clear that though persons could be found to hire her, the Mersey Board would not have let her at this time, and have ample occupation for her for an indefinite time.

"I cannot think, therefore, this case differs in this respect from that of *The Rutland* (2), because no doubt the Warkworth harbour authorities, had they not required the services of their dredger, could have sold or let her. The above observations meet another point that was raised. It was suggested that the

(1) 13 P. D. 48.

(2) Ante, note (2), p. 195.

dredger was engaged on a special work, and that by reason of the delay in the completion of that work she was not at the disposal of the Mersey Board for other purposes, as she would have been. If it could be shewn that at the end of this particular work the Mersey Board would have sold or let her, a claim for damages on this ground might, perhaps, have been sustained. But the registrar and merchants had this point fully before them, and they evidently thought, and to my mind the evidence shews, that there are and will be for an indefinite time works which will require the services of a dredger of this kind. I entertained more doubt as to whether this case could not be distinguished from *The Rutland* (1) on the ground that it was shewn here, but not there, that the absence of the dredger necessitated some work being done twice over. But I have come to the conclusion that the facts proved in this case are very nearly the same as were suggested rather than proved in *The Rutland.* (1)

" The matter in this instance has been carefully investigated, and the result would appear to me to be that over and above the natural prolongation of the work by the employment of one dredger instead of two for above four months, it is probable that a certain amount of work would have to be done twice over by reason of silting up in places where the sand had been removed. But it was quite impossible to say what this really amounted to, because though it would seem that the bottom of the estuary at the point actually rose during the absence of this dredger, it was clear that in great part this was caused by the banks formed by the previous excavation slipping in and so necessitating the removal of sand from a different place, but not in additional quantity. I do not think it necessary to consider whether any and what damages could be given if it could be shewn that a definite additional amount of sand had to be removed, because the evidence in this case appears to me to point to no definite or tangible conclusion on this point.

" The principal witness, Mr. Lyster, was able to say no more than this: 'I think some part of the deterioration was undoubtedly due to the fact that the dredger was not at work, and the other part, I believe, from the banks falling in.' The case, therefore, can be put only on the broad ground that the capital of the Mersey Board invested in the dredger was lying idle, and that the work she would have accomplished was left undone."

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(1) Ante, note (2), p. 195.

On appeal:

Sir Walter Phillimore, *T. G. Carver*, and *W. S. Glynn*, for the appellants (plaintiffs), the Mersey Docks and Harbour Board.

There is no justification for the reduction by the registrar of the sums charged for the Board's own vessels. The charge in the case of the tug *Alert* has been reduced from 12*l.* a tide, which included towing and the use of a hawser, to 6*l.* a tide, and the charges for the "lumps" and the "camels" have been similarly reduced from 5*l.* 5*s.* and 2*l.* 2*s.* to 2*l.* 12*s.* 6*d.* and 1*l.* 1*s.* respectively; but it was proved that the sums fixed by the Board were at the rate regularly charged by the plaintiffs in wreck-raising cases, and that they were lower than would have had to be paid for the hire of corresponding vessels and tugs, so far as obtainable, from other persons. A second-class tug similar to the *Alert* would have cost for attendance on a wreck 12*l.* a tide, for towing 15*l.* a tide, and 5*l.* extra for the use of her hawser, and part of a tide would have been charged as a whole tide. A large plant is a necessity for lightship, surveying, buoying, and wreck-raising purposes, but only the actual plant employed has been charged for, and, in settling the amount of the charges, allowance has been made for the use of such of the plant as is suitable for other purposes.

These charges are not sufficient to make good to the plaintiffs the cost of maintaining and working these vessels, without taking into account the original expenditure upon them, or interest on capital, or depreciation; but, according to the decision of Sir James Hannen in *The Harrington* (1), the Board is entitled to base their charges upon the cost of the special apparatus provided for removing wrecks, this cost to comprise interest upon capital invested in the apparatus, repairs, a

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(1) 13 P. D. 48.

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depreciation fund, and insurance against risk. The registrar has not rightly applied the case of *The Harrington* (1), and has assumed that it was not the cost of the plant to the plaintiffs, but its present value, that was to be considered.

Secondly, it is submitted that the Board is entitled to claim the 1500*l*. for the loss of the use of the dredger sunk by the *Greta Holme*, and that this was wrongly disallowed. There was evidence that when the work upon which she was engaged was completed she could have been let for 100*l*. a week, and for the loss of profitable employment caused by the delay of fifteen weeks the Board was entitled to compensation on the principles laid down in *The Argentino*. (2) There is nothing in Sir James Hannen's decision in *The Rutland* (3) conflicting with this view, for that learned judge only held that there was not enough evidence in that case upon which the proper amount of compensation could be based. All that it is necessary to shew is what, according to reasonable probability, the vessel damaged would have earned: *The Hebe*. (4)

Aspinall, Q.C., and *Butler Aspinall* with him, for the respondents (defendants), the owners of the *Emerald*, and *H. Holman* with him, for the respondents (defendants), the owners of the *Greta Holme*. The registrar was justified on the evidence before him, and by the knowledge and experience of himself and those assisting him, in reducing the charges on the ground that they were excessive and disproportionate to the work; and in this view he has been supported by the President. In fact, the plaintiffs have suffered no loss beyond the wear and tear caused to the vessels and plant engaged in raising and towing the wrecks. In *The Harrington* (1) it appears from the report, which is set out in full in the Maritime cases (5), that the question was dealt with on the basis of the present value of the plant employed. The learned registrar in the present case has borrowed from that case the word "value," and adopted the principle involved. Reductions were made in that case——

[LORD ESHER M.R. The facts in *The Harrington* (1) are not material: the case is only cited for the principle of law laid down by Sir James Hannen.]

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(1) 13 P. D. 48.
(2) 14 App. Cas. 519.
(3) Ante, note (2), p. 195.
(4) 5 Notes of Cases, 176, at p. 182.
(5) 6 Asp. M. L. C. 282.

The particular steamer referred to on the other side was fitted out at considerable cost with large water-tanks for lightship purposes: these expensive fittings were of no use for raising wrecks.

[A. L. SMITH L.J. That is allowed for in the accounts.]

[Counsel for the respondents were not called upon to argue the question of the claim of the plaintiffs for the loss of the use of the dredger.]

Sir Walter Phillimore, in reply.

LORD ESHER M.R. In this case the Mersey Docks and Harbour Board have exercised one of the duties which, if they do undertake, they are obliged to carry out according to the terms of their Act of Parliament, the Mersey Docks Act, 1874. Now, that duty which they have undertaken, not only in this particular instance, but for the benefit of the shipping trade which is carried on in the port of Liverpool, involves this, that if anything is sunk, either at the immediate entrance to the port, or in certain parts of the port, that is up to the docks of Liverpool, so as to impede the navigation, and that something has become a wreck, they will perform the duty of raising it or of getting rid of it as an obstruction When they perform that duty they are not to make a profit by it. Anybody else might make such a profit; but inasmuch as they are doing it for the benefit of the trade of Liverpool they are to do it without making a profit, but they are not to do it entirely at their own expense. They are to make, as against the person to whom the wreck belongs, certain charges which will not comprise profit. That is, in other words, they are to do the work at cost price.

In these two cases, that which has become a wreck is the property of the Board, and it has become an obstruction to navigation. They have, therefore, assumed the duty with regard to their own property as well as with regard to anybody else's property to raise that wreck or get rid of it. How are they to do that as against the person who has improperly

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caused their property to become an obstruction—that is, in this case, against the vessels which collided with their property, in the one case the lightship, and in the other the dredger? As against the wrongdoers, they have the right to say, "You have put us to the cost price of raising those things." The cost price of raising them is what it cost them to do it, and, therefore, they are to have the right to impose, as against the persons who have improperly caused their property to become an obstruction, precisely the same price as they would have charged against a person whose property had become an obstruction by any means whatever, either by accident or otherwise. What you have, therefore, to get at is the cost price of that particular job. How is the calculation to be made? The mode of calculating it was considered by Sir James Hannen in the case of *The Harrington* (1); and on looking at the Act of Parliament applicable in that case, seeing that the Thames Conservancy were only to charge the cost price, and seeing that that must be an intricate problem of calculation, he laid down the rules of calculation in order to get at what the cost price was. Are we to overrule the case of *The Harrington*? (1) I see no ground for doing so. If we do not overrule it we must act upon it. The registrar and merchants ought to have acted upon that rule, and the President of the Court of Admiralty ought to have acted upon it. The question is whether he has. In a great many of the points involved the registrar and merchants and the President have followed the rule laid down in *The Harrington* (1); but they have taken a point in this case which seems to me to be a different point from that laid down in that case—not only an additional point, but one which was overruled in that case, If they did that, the mode of calculation laid down in this case is one with which we cannot agree.

In *The Harrington* (1) Sir James Hannen laid down, for the purpose of getting at the cost price, that there should be taken into account the capital invested in the apparatus provided for the purpose. Is that the value of the apparatus at the moment the apparatus is used? Counsel for the respondents say that it

(1) 13 P. D. 48.

is. I do not agree with them: it is what they originally cost. The cost to which they have been put in providing this apparatus must be taken into account in estimating the charges and expenses incurred in raising a particular wreck, that is to say, the interest on the capital invested in the apparatus. That is not the market value or the value to sell. It is the cost. Sir James Hannen does not lay down that it is to be the present value. It cannot be said that you are to take into account the cost which they were put to in providing the apparatus, and also the present value of the thing. That is impossible. Therefore, the rule is not to take the present value, but to take the cost of it in order to see what is the rate.

The registrar and merchants have, to my mind, given no reason for what they have done. If they have given any reason it is this—that here the raising of the obstruction was the raising of their own property, and therefore they ought to charge less than if it was some one else's property. If that is their view of the matter, I think they are absolutely and clearly wrong.

In my view, we ought to adhere to the rule in *The Harrington* (1), and, therefore, the registrar and merchants ought not to take into account the value. The President has said that they ought to, but the decision in the case of *The Harrington* (1) was given as a guide to the registrar and merchants in future, and they ought to follow that strictly, and not go into the question of the existing value of the apparatus. Therefore the rule which has been acted upon by the Mersey Docks and Harbour Board in the calculation which they have made in order to get at the cost is the right rule. That has been overruled by the learned President; but I do not agree with him in that, and I think their mode of calculation is right, both as to the value of this particular tug and of the other things which have been used. So far we must allow the appeal.

Then the Mersey Board have claimed a large item for what they call, in the case of the dredger, demurrage. They are asking this sum for the loss of the use of the dredger which they say they might have had. They claim on this account the large sum of 100*l.* a week. It has been pointed out, and I think quite fairly, that you cannot recover by way of damages on account of something which you call profit, but of which profit there is no evidence. If they had had the use of the dredger, and she had not been sunk, it is said that they might have made it, and it is said that their engineer, Mr. Lyster, thought they could have let the dredger, and he may have said that they would have let it. How does he say it? He says, for dredging in Calcutta; but Mr. Lyster never would have let her go to Calcutta. Then they talk of letting her go to Preston, and that the Preston people would have given 100*l.* a week probably. It is all imagination. The dredger is not like a ship which is in the hands of a shipowner, which is an instrument kept for the carriage of goods, and which it is his interest to let from day to day as soon as ever he can—at the end of one voyage to let her go under a new charter on a new voyage. That is not the case here. The dredger is not kept for the purpose of being let to any one else. They keep her for the use of the port of Liverpool; and even if they could or might have let her to anybody else, it would have been but for the shortest time, and with power to call her back to Liverpool the moment they wanted her. Otherwise they would have been unable to do the duty they have undertaken for the trade of Liverpool. To say that at some indefinite and future time they could have let her if they had not wanted her is too remote for anybody to act upon in giving them compensation for the loss of the dredger by way of damages. It seems to me that the damages were too shadowy and too remote to be the proper subject-matter of damages in the collision. So far, therefore, I think the learned President was quite right in rejecting that part of the claim. What is the result? In the case, therefore, of the *Emerald*, the appeal must be allowed with costs here, but no costs before the President. In the case of the *Greta Holme* the appeal must be allowed as regards the first point only, but without costs.

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(1) 13 P. D. 48.

A. L. SMITH L.J. These are appeals in two actions brought by the Mersey Docks and Harbour Board against the owners of the *Emerald* and against the owners of the *Greta Holme*. The action against the *Emerald* is for having negligently sunk the lightship *Comet*, and against the *Greta Holme* for having negligently sunk the plaintiffs' dredger called Dredger No. 7.

The actions are for the damages which the Mersey Docks and Harbour Board are entitled to recover for those two causes of action. There is one point in the two cases which is common to both, and that is, how are the expenses of raising the lightship and the dredger to be estimated when the Harbour Board is suing the owners of the colliding vessels for having sent them to the bottom?

The Harbour Board of Liverpool are the wreck-raising authority, and for that purpose have amongst other things tugs and other vessels. To raise these sunken vessels they used, amongst other vessels, their tug called the *Alert*, and did the necessary service of raising these two vessels. When the Harbour Board sent in their claim they charged the owners of the two delinquent vessels for the *Alert* 12*l.* per tide for the services rendered; but the registrar and merchants, whose decision was affirmed by the learned President of the Admiralty Division, have held that that should be cut down to 6*l.* per tide.

The first question is whether, as a matter of law upon the facts of this case, 12*l.* per tide was the fair and reasonable charge, or whether it was only 6*l.* per tide. The facts proved by incontestable evidence are that, to work this tug *Alert*, it costs the Harbour Board at least 12*l.* per tide. Accounts have been put in for several years shewing that throughout those years to work the tug *Alert* at 12*l.* per tide the Mersey Docks and Harbour Board make no profit but incur a loss each year. It is also proved in this case that if any other tug had been used by the Mersey Docks and Harbour Board than the *Alert*—another of the same class performing similar work in the same time as the *Alert*—the cost would have been greater than 12*l.* per tide. Then the question arises whether the Harbour Board are entitled to charge 12*l.* per tide upon these facts for their tug *Alert*. Why is it not a reasonable charge? But the point is taken that, although it is proved that another tug other than

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the *Alert* could not have been got at a price less than 12*l.* per tide to do the work, and that it cost the Harbour Board that sum to use the *Alert*, yet for some reason or other 6*l.* per tide is enough. How have the registrar and merchants arrived at this? In the report of the registrar it is said that they have reduced "to some extent the sums charged for the Board's own vessels to a rate proportionate to their admitted value"—that is, the admitted value of the tug when the work was done, not the admitted value of the services rendered. With all submission, that appears to me to be incorrect. When one looks at the rule laid down by Sir James Hannen in *The Harrington* (1) it does not appear that the learned judge laid down that the value of services as rendered by the *Alert* in this case was to be measured by the value of the tug when the services were rendered. Sir James Hannen in that case laid down what might be taken into consideration in estimating the value of services rendered by a tug like the *Alert* in raising sunken vessels—interest upon capital invested, cost of repairs, depreciation, and insurance. He nowhere lays down that the value of the tug at the time of the services rendered is any criterion of the value of those services. I am of opinion that the principle the registrar went on as to the value of the tug at the time of services rendered is not accurate, and consequently the charge, which has been cut down to 6*l.* per tide, should be reinstated.

I should point out that this is not a question of salvage service rendered, where the value of the salving vessel at risk is an element to be taken into account, but simply a question of what is the value of the work and labour done, that is, what it costs to do it.

With regard to the second point, I have very little to say. It is a claim by the Mersey Docks and Harbour Board against the owners of the *Greta Holme* for demurrage, as they call it. It is really for damages which they have sustained by reason of the dredger being sunk. They are claiming for fifteen weeks at 100*l.* a week, and for sixteen days at 40*l.* a week. It is to be remarked that during all the time that the dredger was sunk and

(1) 13 P. D. 48.

under repair the Harbour Board have not in fact lost one penny. But this ingenious case is started: "We admit that; but we say in consequence of losing her services during the time she was at the bottom she will be so long in doing the work which we have for her to do that we shall not be able to sell her or let her as soon as we otherwise should have been able to do." I agree with the report of the registrar and merchants upon this point. They say that "the Harbour or Conservancy Board are clearly not in the position of a trading company which is entitled to claim for loss of profit, and although their dredging operations were no doubt delayed by the disabling of this dredger, it does not appear to us that the plaintiffs have sustained any tangible pecuniary loss." In that I entirely agree. It is hypothetical in the extreme, and I agree with the Master of the Rolls that upon such evidence as has been given the Harbour Board have not made out any claim for damages. I think that the learned President was quite right in confirming the report of the registrar and merchants upon this part of the case.

RIGBY L.J. I am of the same opinion on both points. It appears to me that 12*l.* per tide was a reasonable and proper charge for the tug *Alert*, and that it ought to be allowed. Let us consider what the charge was. The Mersey Docks and Harbour Board, being entitled to charge for, among other things, the raising of wrecks within their jurisdiction, have several steamers, and, in addition, "lumps" and "camels" for the purpose. How is it they arrive at the charge which they make in respect of the use of these different vessels in connection with the raising of wrecks? They take the actual expense which is occasioned to them by keeping up the vessel for twelve months, and then they have taken the time occupied, and treated it as the amount of service which the ship renders. They charge for a full tide 12*l.*, and make a reduction if the vessel is not occupied during the whole of the tide. I cannot imagine a more fair way of apportioning the amount. If the apportionment is a fair one no one can doubt that the charge is a

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moderate charge. It seems to me to be a fair mode of apportionment; but counsel for the respondents say that the principle is not right, because, upon that basis, if the vessel was only used during the year in raising one wreck, the whole cost of the vessel for the year would be charged to the owner of the wreck. The answer to that is, that the evidence shews that the charge is less than that which the Board would have had to pay if they had hired a tug for the purpose. The difficulty in the matter has arisen from the registrar and merchants misconstruing the rule laid down in *The Harrington* (1), and it is plain that the charge really falls below what would have had to be paid if the Board had taken what would appear to be the only alternative course of hiring tugs from the tug-owners for any particular work. I do not read the case of *The Harrington* (1) as giving any such direction as that upon which the registrar and merchants acted. I read that case as saying that a charge may be made for interest on the invested capital, depreciation, and insurance; whereas, in this case, the Harbour Board have not even charged interest on the cost of the vessel. I cannot see anything in that case which would justify this arbitrary act of cutting down the charges, in themselves shewn to be reasonable, by one-half. Therefore on that point I agree with the other members of the Court that the appeal in the case of the *Emerald* should be allowed in its entirety, and that in the *Greta Holme* the appeal should be allowed so far as it relates to those charges.

With regard to the question of damages, there is no doubt that in one sense the Mersey Docks and Harbour Board were injured by not having their dredger to do her work during the time she was being raised and repaired; but is that anything upon which the Court can give pecuniary damages? The Board, as a Board, loses nothing. It is the people who are interested in the navigation of the Mersey who lose, if it is a loss. The Board attempted to shew that in some circumstances they might let this dredger; but the evidence failed to fix any definite time when the Board would no longer require to use her. It seems to me that the suggested damage which might be occasioned to the Mersey Docks and Harbour Board was mere speculation.

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(1) 13 P. D. 48.

Appeal of the plaintiffs in the case of the Emerald allowed with costs; in the case of the Greta Holme allowed in part without costs. (1)

Solicitors for appellants (plaintiffs), the Mersey Docks and Harbour Board: *Rowcliffes, Rawle, & Co., for A. T. Squarey, Liverpool.*

Solicitors for respondents, the owners of the *Emerald*: *Thomas Cooper & Co.*

Solicitors for respondents, the owners of the *Greta Holme*: *Downing, Holman & Co.*

T. L. M.

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June 8, 23.

IN THE GOODS OF HUBER.

Probate—Administration—Administration with Will annexed—Will made in Execution of Power of Appointment—Foreign Domicil of Testatrix.

A testatrix who at the time of her death had a French domicil, executed, in pursuance of a power of appointment, a will in the English form invalid according to French law.

The Court, on the authority of the decision of Sir C. Cresswell in *In the Goods of Alexander* (29 L. J. (P. & M.) 93), which it held to be binding, though erroneous, following in this respect the decision of Sir J. P. Wilde in *In the Goods of Hallyburton* (L. R. 1 P. & D. 90), granted administration with the will annexed.

APPLICATION by Adèle Lisette Pouey for a grant of administration with the will annexed, to the personal estate in England of her mother, Mary Hamilton Huber.

The testatrix was born a British subject. In 1859 she married Alphonse Huber, a French subject. They separated in 1866, and continued to live apart till her death in 1895.

In 1879 the father of the testatrix died intestate, and an administration suit, to which she and her husband were parties, took place in the Chancery Division. In 1880 in the course of this suit the testatrix executed a deed, by which she assigned to trustees 4000*l.*, in trust for herself for life, with remainder to her child, children, or remoter issue as she should by deed or will appoint.

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(1) To avoid a reference back the plaintiffs agreed to accept 215*l.* more than allowed by the registrar in the case of the *Greta Holme*, and 95*l.* more in the case of the *Emerald*.

In 1895, while at St. Jean de Luz, in France, she executed a will in the manner prescribed by the Wills Act, reciting the power under the settlement of 1884, and purporting to exercise it (inter alia) in favour of her daughter, the applicant, whom she made one of the principal legatees. The executors renounced. In the will the testatrix stated that her domicil was English; but, since her separation from her husband, she had generally lived in France.

Bargrave Deane, for the applicant. Apparently the domicil of the testatrix was French; but this is immaterial, as the will was made in pursuance of a power. It is so laid down in *In the Goods of Alexander* (1) and *In the Goods of Hallyburton.* (2) Perhaps, however, according to *Tatnall* v. *Hankey* (3) and *Barnes* v. *Vincent* (4), the Court of Probate has only to decide whether or not the document is a will, leaving it to the Chancery Division to say whether the power has been duly exercised; or it may be that, since the Judicature Acts, the Court of Probate ought to settle both questions.

Cur. adv. vult.

Sir F. H. Jeune, President. The testatrix, who was born a British subject, married in 1859 a French subject, and it must, I think, be taken that, at the time of her death, which occurred on May 7, 1895, her domicil was French. By a postnuptial settlement made, as I understand, under a compromise in an action in the Chancery Division, and executed on June 17, 1880, certain property in England was placed in the hands of English trustees in trust to pay the income to her for life with remainder to her children, or remoter issue, as she should by deed, or will, appoint. On June 2, 1890, she executed a will, in English form, by which she exercised this power of appointment.

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(1) 29 L. J. (P. & M.) 93.

(2) L. R. 1 P. & D. 90.

(3) 2 Moo. P. C. 342.

(4) 5 Moo. P. C. 201.

Apart from its being in pursuance of a power of appointment, this will clearly would not be valid: *Bloxam* v. *Favre.* (1) But the question is, whether, being in execution of the power above mentioned, it must not be admitted to probate.

The point thus raised is one upon which it cannot be said that the law is in a satisfactory condition; but I must take the law as it stands. I think I am bound by the decision of Sir Cresswell Cresswell in *In the Goods of Alexander.* (2) It is true that in that case the learned judge corrected an earlier

(1) 9 P. D. 130.

(2) 29 L. J. (P. & M.) 93. In *In the Goods of Alexander* Sir C. Cresswell said: "The only question that arises is whether the will was made in execution of a power. I will take this opportunity of correcting what fell from me in *Crookenden* v. *Fuller* (1 Sw. & Tr. 441), in reference to this question, which I find is not warranted. In that case one of the arguments urged in favour of the will was, that it was, except a certain portion, made in pursuance of a power, and, therefore, that the rule of law, which requires a will to be executed in accordance with the law of the domicil, did not apply to it. The decision in *Crookenden* v. *Fuller* did not turn on that point; but I expressed an opinion that, if it did, the Court would have to see that the will was duly executed in conformity with the law of the domicil before it granted probate. The contrary is asserted in the marginal note to *Tatnall* v. *Hankey* (2 Moo. P. C. 342) which is in these words: 'A will disposing of personal estate situate in this country made in pursuance of a power of appointment, and executed in compliance with the requisites of the power, is entitled to probate, though not executed according to the testamentary law of the domicil of the party making it.' The judgment of the Judicial Committee, as reported in Moore, does not bear out that proposition, being that the Judicial Committee 'are of opinion that the Court below had the jurisdiction which it repudiated, and that so far the sentence of the Prerogative Court must be reversed.' A gentleman, who is publishing a book on the practice of the Court of Probate, has kindly furnished me with a copy of the actual report made to Her Majesty by the Judicial Committee, which gives an express opinion on this very point. After stating their opinion that the Court below had jurisdiction, and ought to exercise it, their Lordships go on to say, 'That the validity of the will of the said Harriet Drummond, deceased, so far as regards the appointment of the residue of the personal estate of the said Charles Boone, deceased, does not depend upon the law of domicil of the said Harriet Drummond at the time of her decease.' This express opinion of the Judicial Committee is conclusive, and of course relieves me from all difficulty; and I therefore grant the motion."

The following is from Dodd and Brooks's Probate Practice, pp. 227, opinion of his own in the case of *Crookenden* v. *Fuller* (1), in which he had said (2): "It seemed to me at the time that I could only grant probate of that which is a will, and, if a will, it must be a will duly executed, and I can only recognise that as a will duly executed, which is in conformity with the law of the domicil; and to this opinion I adhere." But in *In the Goods of Alexander* (3) the learned judge departed from this view, the matter being, as he considered, governed by the terms of the report of the Judicial Committee in the case of *Tatnall* v. *Hankey* (4), which, though appearing in the head-note of the case, were not borne out by the conclusion at which their Lordships arrived, nor by the reasons for that conclusion as expressed by Lord Brougham. It is true, also, that, in 1866, Lord Penzance expressed his strong impression that Sir Cresswell Cresswell was right in *Crookenden* v. *Fuller* (1) (*In the Goods of Hallyburton* (5)), and that the report on which he acted in *In the Goods of Alexander* (3) was at variance with the view of the Privy Council subsequently expressed by Lord Brougham in the case of *Barnes* v. *Vincent*. (6) It is, I think, impossible not to agree with the opinion of Lord Penzance, and the reasoning on which it is founded. The report, which I have verified, is in the terms of which Sir Cresswell Cresswell was informed; but it is remarkable that that learned judge should have attributed such weight to a report which, if the usual practice was followed, was not submitted to the Judicial Committee, and

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228: "The judgment of the Judicial Committee in *Tatnall* v. *Hankey* as reported by Mr. Moore turns wholly upon the jurisdiction of the Court of Probate in respect of testamentary appointments, and determines merely that the Court below had the jurisdiction which it repudiated. The report made by their Lordships to the Queen in Council goes somewhat further than Mr. Moore's. . . . . 'Their Lordships did agree humbly to report their opinion to Your Majesty against the appeal . . . . that the validity of the will of the said Harriet Drummond, deceased, so far as regards the appointment of the residue of the personal estates of the said Charles Boone, deceased, does not depend upon the law of the domicil of the said Harriet Drummond at the time of her decease.'"

See also the note of the editors to *Crookenden* v. *Fuller* (1 Sw. & Tr. 441), at p. 454.

(1) 1 Sw. & Tr. 441.

(2) At p. 454.

(3) 29 L. J. (P. & M.) 93.

(4) 2 Moo. P. C. 342.

(5) L. R. 1 P. & D. 90.

(6) 5 Moo. P. C. 201.

was certainly not supported by the statement of their Lordships' opinions in that case, and was at variance with their views expressed in a subsequent case. But inasmuch as Lord Penzance in 1866 refused to disturb the law as laid down in *In the Goods of Alexander* (1), because wills might have been made in reliance on that authority, a fortiori must I pursue the same course in 1896.

These cases did not, however, decide more than that it was for the Court of Chancery and not for the Court of Probate to say, having regard to the terms of the power, not only whether the person professing to execute the power by will could do so, but also whether the form in which the execution was effected validly conformed to the power; and it was suggested to me in argument that it would not be for the Chancery Division to decide if this will were valid in form. It seemed, therefore, to me—and this was the point I reserved judgment to consider—whether, as the above cases were before the Judicature Acts, if it were clear that the Chancery Division would hold this will invalid, it was not now the duty of this Court to decide at once what the Chancery Division would certainly decide later. But I think the view taken by the Court of Chancery of the case of *In the Goods of Alexander* (1) renders it impossible for me to say that this will is not valid considered as an execution of the power. There is a dictum at least of Lord Romilly in the case of *D'Huart* v. *Harkness* (2), which seems to me to lay down that the case of *In the Goods of Alexander* (1) went the full length of deciding that a will made under a power might be good though not executed according to the law of the domicil. In that case Lord Romilly said: "The case cited (*In the Goods of Alexander* (1)) merely shews that an appointment by will executed according to the requirements of the power is entitled to probate, though it does not follow the formalities of the law of the domicil. The law takes a liberal view, and, where the instrument creating the power directs it to be executed by will in a particular form, a will may be good for the purposes of the appointment, if executed according to the law of this country, though not according to the law of the domicil. That is, where

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(1) 29 L. J. (P. & M.) 93.

(2) 34 Beav. 324, at p. 328.

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the instrument creating the power directs it to be executed by will, executed in a particular way, it may be a good will if executed in the form required, though not according to the law of the domicil." I do not think it is for me to criticise this exposition, still less to override it, and I cannot in the face of it hold that the will is not a due execution of the power, and refuse probate of it, because it is not made in accordance with the domicil of the testatrix.

I therefore grant administration with the will annexed as prayed.

Solicitor: *A. W. Burn.*

H. D. W.

C. A.

1896

May 14.

[IN THE COURT OF APPEAL.]

MORAN *v.* PLACE.

Probate—Practice—Married Woman, Proceeding instituted by—Costs of Litigation—Entry of Caveat—Property subject to Restraint on Anticipation—Married Women's Property Act, 1893 (56 *&* 57 *Vict. c.* 63), *s.* 2—*Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 100—*Rules of Supreme Court*, 1883, *Order I.*, *r.* 1; *Order II.*, *r.* 1.

An executor's probate action, brought in consequence of a caveat entered by a married woman who was made defendant to the action, resulted in a verdict for the plaintiff with costs against the defendant. Upon an application by the plaintiff under the Married Women's Property Act, 1893, s. 2, for an order for payment of the costs out of property to which the defendant was entitled subject to a restraint on anticipation:—

Held, by the Court of Appeal, affirming the decision of Gorell Barnes J., that the proceedings in the probate action were "instituted" within the meaning of the Act of 1893 by the issue of the writ by the plaintiff, and not by the entry of the caveat, or the appearance of the caveator in answer to the warning; and accordingly that the order applied for could not be made.

APPEAL from a decision of Gorell Barnes J. in an action in the Probate Division for the probate of the will of William Moran.

After the death of the testator William Moran, Mrs. Place, a married woman, entered a caveat in respect of the will. The executrix of the will, according to the usual practice, gave

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warning to the caveator to enter an appearance to the caveat, and Mrs. Place entered such appearance. The executrix then issued the writ in this action, making Mrs. Place defendant thereto, and delivered a statement of claim propounding the will. The action was tried with the result that the will was established, and Mrs. Place was ordered to pay the costs. Mrs. Place was entitled to a life interest for her separate use without power of anticipation in certain settled property, and the plaintiff applied by motion under the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 2 (1), for an order that payment of the costs of the action might be made out of the property to which Mrs. Place was so entitled, and that such payment might be enforced by the appointment of a receiver, and the sale of the property or otherwise.

The application was heard before Gorell Barnes J., and was refused upon the ground that the "proceeding" in the probate action had not been "instituted" by Mrs. Place within the meaning s. 2 of the Act of 1893.

The plaintiff appealed.

Warrington, Q.C., and *C. J. Giles*, for the appellant. A caveat by itself merely keeps matters in the same position. It is a notice to the officer of the Court of Probate not to allow anything to be done in the matter of the will without notice to the caveator, i.e. the person who has lodged the caveat. The executor then warns the caveator to enter an appearance. The entry of an appearance to the warning is the commencement of the contentious business. The appearance to the warning relates back to the caveat, and thus the proceedings are in reality "instituted" by the entry of the caveat, and the costs of the entry of the caveat and of the warning would be costs in the cause. Accordingly, in this case the proceedings were "instituted" by Mrs. Place, the caveator. The case thus comes within the section, and the costs may be ordered to be paid out of the property to which she is entitled subject to the restraint on anticipation: Probate Court Rules of July, 1862, r. 12; Coote and Tristram's Prob. Prac. (ed. 1891), p. 827; *Hood Barrs* v. *Cathcart.* (1)

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(1) Sect. 2 of the Married Women's Property Act, 1893, is as follows :—

"In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just."

No doubt a writ of summons must now be issued as the formal commencement of the action, for a writ takes the place of a citation under the former practice: Judicature Act, 1873, s. 100; Rules of the Supreme Court, 1883, Order I., r. 1; but the "proceeding" (which is a wider term than action) is initiated by the entry of the caveat, and none the less so although for the sake of convenience and uniformity the person entering it becomes a defendant. A caveat taken together with the appearance has set the "lis" going, and for the purpose of costs is the "institution" of the proceeding: *In the Goods of Chamberlain* (2): *Coplestone* v. *Nicholes* (3); *Peacock* v. *Lowe* (4); 3 Burn's Ecclesiastical Law (9th ed.), p. 192.

Bayford, Q.C., and *Durley Grazebrook*, for the respondent were not called upon.

LINDLEY L.J. In this case we have to consider s. 2 of the Married Women's Property Act, 1893, and apply it to the facts of this particular litigation. The defendant, Mrs. Place, who is a married woman, entered a caveat against the probate of the will of the testator. A caveat is not a notice to any opponent in particular. It is a notice to the registrar or officer of the Court not to let anything be done by anybody in the matter of the will, or the goods of the deceased, without notice to the person who lodges the caveat. It is impossible to look at it as commencing any litigation—it merely requests the registrar to tell the caveator if anybody stirs in this matter. That caveat having been entered and there being an address so that the person entering it can be found, the next thing is that somebody does begin to stir in the matter. That is the present plaintiff,

(1) [1894] 3 Ch. 376, 378.

(2) L. R. 1 P. & M. 316.

(3) 33 L. J. (P. & M.) 57.

(4) L. R. 1 P. & M. 311, 312.

who is the executor of the will and wishes to prove it. When a caveat has been entered the person who wishes to prove the will has to warn the person who entered the caveat, and if such person, i.e. the caveator, intends to make any real objection, he enters an appearance. Then, if the litigation goes on, the person who wants to prove the will issues a writ and serves it on the caveator. Then, and not before, there is litigation between the person propounding the will on the one side, and the person opposing it on the other.

Now, if we look at that state of things quite apart from all technicalities, who is the person who institutes the proceeding? I should say that it is the person who is the actor from the beginning, namely, the plaintiff. It is perfectly true that the person who entered the caveat caused the litigation, but she did not institute the proceeding by herself or anybody acting as her agent. What she did was to force somebody else to institute proceedings against her.

That being the real state of the case, let us turn to the Act of Parliament which we have to apply, namely, the 2nd section of the Married Women's Property Act, 1893. [The Lord Justice then read that section, and continued :—]

Can we say that Mrs. Place, who entered the caveat and who has had proceedings instituted against her in consequence of that caveat, has instituted these proceedings? Quite apart from all technicalities, I say, No.

Then reliance was placed on some expressions used by Sir James Wilde in the case of *Coplestone* v. *Nicholes* (1) and *Peacock* v. *Lowe*. (2) I have read the judgment in *Peacock* v. *Lowe* (2), and I see what the learned judge meant. But under the modern practice, I do not think it would be correct to say that there were two ways of instituting proceedings, because that state of things is now put an end to, and under Order I., r. 1, of the Rules of 1883 the only method of instituting proceedings such as these is by an action commenced by writ.

It appears to me, therefore, that, although Mrs. Place caused these proceedings to be instituted against her, she did not institute them herself within the meaning of the Act. I con-

(1) 33 L. J. (P. & M.) 57.

(2) L. R. 1 P. & M. 311.

fess I am rather sorry for the conclusion at which I have arrived, because I do not think the Act is quite so wide as it might have been.

LOPES L.J. I am of the same opinion. The question is whether this case can be brought within s. 2 of the Married Women's Property Act, 1893. It is said that it can be, because Mrs. Place is really the person who instituted this action or proceeding. If nothing had been done the will would have been proved in what is called common form; but Mrs. Place entered a caveat, the effect of which is merely to tell the registrar that nothing is to be done in the goods of a certain person who died on a certain day without notice to the caveator. [The Lord Justice then stated the subsequent proceedings of the parties, and then continued:—]

In these circumstances I am unable to come to the conclusion that Mrs. Place instituted this action or proceeding. The proceeding or action was instituted by the writ, and Mrs. Place never could by any possibility have been anything but a defendant; and it seems to me a contradiction in terms to say that a person who can by no possibility be anything but a defendant is a person instituting or commencing an action or proceeding. All that took place previously to the issue of the writ was preliminary. Up to the time of the issue of the writ, I cannot see anything in the nature of a lis pendens between the parties, or of any contentious business. The moment the writ was issued, then the action or proceeding was commenced.

Two cases were relied on: *Coplestone* v. *Nicholes* (1) in 1863, and *Peacock* v. *Lowe* (2) in 1867. But they were both before the date of the Judicature Act, 1873; and I do not think that they are of any value, because under Order I., r. 1, of the Rules of the Supreme Court, 1883, "all actions which previously to the commencement of the principal Act were commenced . . . . by citation or otherwise in the Court of Probate shall be *instituted*" (the very word used in the Act of 1893) "by a proceeding to be called an action"; and, turning to s. 100 of the Judicature Act, 1873, we find an action defined to mean "a proceeding commenced by writ, or in such other manner as may be prescribed by Rules of Court." The conclusion to which I come is that Mrs. Place cannot, by reason of her having entered the caveat, be said to be a person instituting an action or proceeding within the meaning of this section. If that is so, she cannot be held liable for costs in the way that is asked.

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(1) 33 L. J. (P. & M.) 57. (2) L. R. 1 P. & M. 311.

I am of opinion that the decision of the learned judge below was correct, and that this appeal must be dismissed with costs.

KAY L.J. The married woman in this case was the defendant in an action regularly instituted in the Probate Court, the object of which was to prove in solemn form the will of a testator.

In that action she was ordered to pay the costs. This is an appeal that these costs may be paid out of her separate estate, which is subject to a restraint on anticipation, on the ground that she instituted the proceeding within the meaning of s. 2 of the Act of 1893.

It is rather an odd thing to say that a defendant who has lost her action, and has been ordered to pay the costs, "instituted" the proceeding; but the way in which that is attempted to be made out is this. This lady entered a caveat in the Probate Court. The effect of that is, that if any proceedings whatever are taken to propound the will or in relation to the estate, she is to have notice of it. It does not mean of necessity that she intends to fight or litigate, or anything of that sort: she merely wants notice. The next proceeding is that the person who wants to propound the will warns the caveat. Even then there is no litigation, because the name of the caveator is not known. He may have used a fictitious name, and the only name which the caveat gives, which is necessarily the true name, is the name of the solicitor, and the notice would be given to the solicitor. However, when the caveat is warned the person who warns gives his name, and intimates by notice then given to the person who entered the caveat that he means to propound the will. Still, the person who entered the caveat need not fight unless he likes. He might have only wanted to have notice without meaning to do anything, and he need not enter an appearance. But, if he enters an appearance, then he has to give his name, and when he has given his name then there is an intimation that A. B., who warned the caveat, means to propound the will, and that C. D. means to resist it. But even then, since the Judicature Act another step must be taken: the person who gives the warning must, as plaintiff, issue a writ against the person who entered the caveat. Then, at last, there is a lis pendens, a regular litigation begun by writ by A. B. against C. D. It is said that although this married woman was a defendant in an action so commenced, she nevertheless instituted the proceedings, because she entered a caveat, and the proceedings were commenced by the caveat. We asked, Did the caveat constitute a lis? The name of the person entering the caveat is not necessarily given; certainly there is no defendant; there is no opponent; it is merely a direction to the registrar to give notice to the solicitor of the person entering the caveat if any proceeding should be taken. It is impossible to say that any lis was commenced by entering the caveat. There might be more reason for saying that when that caveat was warned and appearance entered to the warning that litigation had commenced. But I think now, since the Judicature Act, the litigation is commenced when the writ is issued, and not before.

Some language of Sir James Wilde (afterwards Lord Penzance) in two cases of *Coplestone* v. *Nicholes* (1) and *Peacock* v. *Lowe* (2) has been referred to. Those cases were before the Judicature Act, the last being in 1867, and no doubt he does say in that last case (3): "The next question is whether proceedings have been taken for proving the will in solemn form. The ordinary way of doing so in the ecclesiastical courts was by citation, but it is plain that it was not the only way; for when a suit commenced by caveat, and the caveat was warned, and an appearance entered, the next step was for the party upholding the will to propound it in a 'common condidit,' the first sentence of which set out that it was a 'business of proving a will in solemn form of law.'" But in the very judgment

(1) 33 L. J. (P. & M.) 57.

(2) L. R. 1 P. & M. 311.

(3) L. R. 1 P. & M. 312.

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in which he used that expression he previously used these words (1): "The executors have propounded the will in a declaration, but no plea has been filed, and it is obvious that until a plea is filed it is impossible to say whether or not the validity of the will is in dispute. The mere entering of a caveat does not shew that there is any dispute as to the validity of a will, for it is often entered in order that the person entering it may have notice of the will being proved, without any intention of disputing it, and there is nothing to preclude him from withdrawing his opposition, and allowing the executors to take probate in common form. The validity of the will is not in dispute until the plea is filed."

It is absolutely inconsistent with that to suppose that the learned judge meant that, for all purposes, a litigation of this kind was begun by entering a caveat; and I go further, because the application in that case was to allow the heiress-at-law to be cited, and "by the 61st section of the Probate Act" (20 & 21 Vict. c. 77), "there are two states of things," says the learned judge, "in which the heir-at-law may be cited, the first being where proceedings are taken to prove a will in solemn form, and the second where in any contentious cause or matter the validity of a will is disputed." If a citation was a proceeding taken to prove a will in solemn form or the first step of such a proceeding, it would be the duty of the learned judge to allow the citation to issue on that ground, but he does not do so. He says most clearly that it was premature at that stage to issue the citation: he could only do it when the validity of the will is in dispute. The case did not come within the first clause of the section he read, and he refused to allow the citation to issue.

Upon the whole I am clearly of opinion that, since the Judicature Act, at any rate, the proceedings do not commence by the entry of the caveat. That is not the institution of the proceedings in any true sense of those words, and I do not think that, even before the Judicature Act, there is any ground for saying that any proceedings were commenced by the mere entry of a caveat. I therefore think the learned judge in this

(1) L. R. 1 P. & M. 312.

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case was quite right, and that the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *T. C. Summerhayes; Stibbard, Gibson & Co.*

W. W. K.

C. A.
1896
May 5;
June 6.

[IN THE COURT OF APPEAL.]

M. E. M. WATKINS *v.* W. T. P. WATKINS.

Divorce—Decree against Husband—Divorced Wife—Maintenance—Alienation Divorce Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 32—*Divorce and Matrimonial Causes Act Amendment Act*, 1866 (29 & 30 *Vict. c.* 32), *s.* 1—*Rules of December* 26, 1865, *rr.* 95 *to* 103.

Sums of money ordered under s. 1 of the Divorce and Matrimonial Causes Act Amendment Act, 1866, to be paid by a husband for the maintenance of his divorced wife, are a purely personal allowance, and so long as the order subsists can neither be alienated nor released.

The decision of the President affirmed.

UPON petition for a divorce upon the ground of cruelty and adultery presented by the above-named Margaret Ellen Mahon Watkins (now Clingan) a decree nisi was made on November 14, 1873, for the dissolution of her marriage with the above-named William Theodore Pitt Watkins, and this decree was made absolute on August 1, 1876.

On July 18, 1876, the Divorce Court, with the consent of the respondent, ordered him to pay to the petitioner, by way of permanent maintenance, the sum of 80*l.* per annum during their joint lives by quarterly payments.

This allowance fell into arrear, and in May, 1886, the respondent owed the petitioner a considerable sum of money under the order of July, 1876, and by an indenture dated May 13, 1886, in consideration of 100*l.* paid by the respondent, the petitioner released him from all claims in relation to that order.

On April 22, 1893, in an action brought by the petitioner against the respondent, Romer J. made a declaration that this release of May 13, 1886, ought to be set aside and delivered up to be cancelled and ordered and adjudged accordingly.

On October 30, 1893, an agreement was entered into between the respondent and the petitioner whereby, in consideration of his making certain payments to her, each party released the other from all claims.

On January 21, 1895, the petitioner obtained ex parte from the President of the Divorce Court an order that the respondent should pay to her the sum of 600*l.* for arrears of permanent maintenance; but in view of a compromise she abstained from enforcing this order, and nothing further took place until June 22, 1895, when, the compromise having fallen through, she obtained the issue of a writ of sequestration for 600*l.* and costs against the real and personal property of the respondent. The respondent then moved to set aside the order of January 21, 1895, and to discharge the sequestration. This motion came before the President on January 27, 1896, when the learned judge expressed his opinion that permanent maintenance under the Matrimonial Causes Act, 1866, was analogous in its nature and objects to permanent alimony under the Act of 1857, which from the cases was clearly inalienable, and dismissed the motion; but as the object of maintenance was to provide an allowance for the wife to live on, and not one which she might allow to accumulate, the learned judge held that the petitioner was only entitled to the allowance of 80*l.* per annum for the period between October 30, 1893, and June 22, 1895, and directed that as to that amount the sequestration should stand.

Two appeals were brought against this decision, one by the petitioner, and the other by the respondent.

Barnard, in support of the respondent's appeal. Sums payable under the Act of 1866 for the maintenance of a divorced wife are alienable, and it was competent for the petitioner to release not only the arrears of such an allowance, but also her prospective right to future payments. There is no decision in the books that maintenance cannot be assigned or released. It has no doubt been held that permanent alimony under the Act

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of 1857 cannot be alienated: *In re Robinson* (1); *Linton* v. *Linton.* (2) But there is a clear distinction between permanent alimony and maintenance of this character. The former is a provision for a wife either during the pendency of a suit or after a decree for judicial separation; and a husband is in law always bound to support his wife. After a divorce the woman ceases to be a wife, and the husband is under no liability to support the woman from whom he has been divorced. Any person has at law the right to dispose of property belonging to him, and there are no words in the 1st section of the Act of 1866 to deprive the petitioner of this right. Under s. 32 of the Act of 1857 a wife would have power to alienate, charge, or release her maintenance: *Harrison* v. *Harrison* (3); and the only difference between maintenance under the Act of 1857 and maintenance under the Act of 1866 is that the latter is payable monthly or weekly.

Bargrave Deane, for the petitioner, in support of her appeal and in opposition to the respondent's appeal. Permanent maintenance for a divorced wife under s. 1 of the Act of 1866, being a personal allowance paid to the divorced wife during the joint lives of herself and her former husband, is incapable of alienation or release, although the Court has power to discharge, modify, or suspend the order, and again to revive it. Permanent alimony for wives after judicial separation has always been held to be inalienable, and the principles applicable to permanent maintenance under s. 1 of the Act of 1866 are the same. The learned President took this view, but by his order of January 27, 1896, he limited the amount of the arrears of the allowance to be paid by the respondent to the petitioner to the period between October 30, 1893, and June 22, 1895; and it is contended that the arrears ought not to be so limited, and that the petitioner is entitled to arrears as far back as they are due. [He referred to *Linton* v. *Linton* (2) and *De Blaquiere* v. *De Blaquiere.* (4)]

[LOPES L.J. referred to *Underwood* v. *Underwood.* (5)]

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(1) 27 Ch. D. 160.
(2) 15 Q. B. D. 239.
(3) 13 P. D. 180.
(4) 3 Hagg. Ecc. 322.
(5) [1894] P. 204.

Barnard, for the respondent, was not called upon.
Kilburn appeared for the sequestrators.

Lindley L.J. I do not think that we can interfere with the order of the President as to the period of the arrears, and the appeal of the divorced wife must be dismissed. As to the appeal of the respondent, we shall take time to consider our judgment.

June 6. The following judgments were delivered by:—

Lindley L.J. The Divorce Act of 1857 established divorces as distinguished from judicial separations, and contained provisions defining the position and rights of divorced wives. A woman divorced is no longer a wife; she has not the rights, nor has she the duties of a married woman. She is at liberty to marry again. The equitable doctrines of separate use and restraint against anticipation have no application to her until she does marry again. Whatever property she may have or acquire is her own; her former husband has no interest in it. He, on the other hand, is not bound to support her; she has no implied authority to pledge his credit even for necessaries. She is free from him and he from her. Sect. 26 of the Act of 1857, which makes a husband liable for the support of his wife if he does not pay her the alimony ordered by the Court, only applies to judicial separations. There is no similar enactment applicable to cases of divorce. The Court for divorce has, however, power to make orders for the maintenance of a divorced wife (s. 32), and for the custody of the children of the marriage (s. 35), and for the execution of settlements for the benefit of the innocent party and of such children (s. 45). These powers have been enlarged by later Acts, and rules have been made for their exercise. On the present occasion we are only concerned with the power to order maintenance after divorce. This is conferred by s. 32 of the Act of 1857 and by s. 1 of the Amending Act of 1866. The rules relating to it are those of December 26, 1865, 95 to 103. It is not immaterial to observe that alimony for wives after judicial separation—i.e., permanent alimony—is governed by other sections and rules—

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namely, ss. 22, 24, 26, and rules 81 to 94. Permanent alimony for a judicially separated wife is and always has been inalienable by her. The Court which ordered it never lost control over it, and she could not by assignment or otherwise deprive herself of her right to it so long as she and her husband lived separate and apart from each other. This doctrine is based on the old ecclesiastical law, and was recognised and acted upon in *In re Robinson.* (1) In *Linton* v. *Linton* (2), and again in *In re Hawkins* (3), it was held that the bankruptcy of the husband did not discharge him from his obligation to pay his wife alimony under an order of the Court. The question now arises whether the same doctrine applies to an order for permanent maintenance after a divorce as to alimony after judicial separation. The learned President has held that it does. He came to this conclusion on various grounds, and he appears to have thought that the point was really decided by *Linton* v. *Linton.* (2) The judgment of the Master of the Rolls in that case certainly shews that he did not consider permanent maintenance under s. 1 of the Act of 1866 as more alienable than alimony. But *Linton* v. *Linton* (2) was a case of judicial separation and not divorce, and the differences between the two are so great that a decision on the one cannot be regarded as if it were a decision on the other. The head-note in *Jardine* v. *Jardine* (4) is so worded as to suggest that the full Court had decided that the Court could modify orders for permanent maintenance; but all that the Court said was that the allowance of 500*l.* a year was not too much, as it could be reduced.

The question which has now to be decided, and decided for the first time, turns simply on the true interpretation and effect of s. 1 of the Act of 1866. The object of the section is plain: it is to enable the Court to order divorced husbands who cannot make settlements to maintain their divorced wives out of their earnings. The payments to be made to the divorced wife are to be for her maintenance and support. This language points to a purely personal allowance. Such allowances are by no means unknown to the law. Alimony is one instance. An

(1) 27 Ch. D. 160.
(2) 15 Q. B. D. 239.
(3) [1894] 1 Q. B. 25.
(4) 6 P. D. 213.

officer's full or half pay is another. It is true that in a case like this the Court has no power to increase the allowance once made, and there is good reason for this; for, the marriage bond being at an end, there is no reason why the woman's allowance should increase with her late husband's means. On the other hand, if he cannot pay the allowance fixed by the Court, the Court can reduce it or suspend its payment, or even discharge the order for maintenance, and so release the husband altogether. This power goes far to shew that permanent maintenance under s. 1 of the Act of 1866 is more like alimony than an ordinary annuity, or than an annuity ordered to be secured under s. 32 of the Act of 1857. I cannot think that if a divorced wife became bankrupt the Legislature intended that her former husband should be compelled to pay her allowance to her trustee, or to a purchaser of it from him. It is, however, necessary to notice two difficulties which here present themselves. In the first place, a deed or will granting an allowance to a person for his or her maintenance and support without more is alienable: see *Younghusband* v. *Gisborne.* (1) But this is because an absolute gift cannot be fettered by imposing a particular mode of enjoyment. It does not follow that an Act of Parliament must be construed so as not to infringe this rule. In the next place, an annuity ordered to be secured under s. 32 of the Act of 1857 has been decided to be property alienable and chargeable by the divorced wife: see *Harrison* v. *Harrison.* (2) Is an allowance ordered to be paid to a divorced wife under s. 1 of the Act of 1866 more personal and inalienable than such an annuity? It is certainly less secure and less permanent. Under s. 32 of the Act of 1857 an annuity may be ordered to be secured to the wife for her own life; but this cannot be done under s. 1 of the Act of 1866. In *Harrison* v. *Harrison* (2) there was no deed securing the annuity to be construed. There was only an order to secure an annuity. As pointed out by Cotton L.J. (3), a deed might have been drawn making the annuity determinable on alienation whether voluntary or involuntary, and the only point decided was that

(1) 1 Coll. 400.

(2) 13 P. D. 180.

(3) 13 P. D. at p. 183.

the wife's solicitor, who had procured her the order for its payment, would have been held entitled to a charge on the annuity for his costs under 23 & 24 Vict. c. 127, s. 28, if it had not been for other circumstances which induced the Court not to give him such a charge. I do not think that this case compels me to put upon s. 1 of the Act of 1866 an interpretation which I should not otherwise think correct. Fry L.J. (1) drew attention to the fact that an annuity ordered to be settled under s. 32 of the Act of 1857 was very different from an allowance ordered to be paid under s. 1 of the Act of 1866. I concur in this view of the two sections. Although, therefore, I cannot regard *Linton* v. *Linton* (2) or any other previous case as actually deciding the question before us either one way or the other, yet, having regard to the language and object of the section and the analogies to which I have alluded, I have arrived at the conclusion that the interpretation put upon it by the learned President is correct, and that allowances to divorced wives made under it are personal to themselves and cannot be assigned. Nor can they, in my opinion, be released without the sanction of the Court. A divorced wife need not enforce an order for her own maintenance unless she pleases, and she may release and I suppose assign her right to arrears. But it does not follow that she can bind herself not to enforce payment in future, nor that she can assign her right to future payments. I do not say that an order under s. 1 of the Act of 1866 for permanent maintenance cannot be discharged by the Court with the consent of the divorced husband and wife even if the man is able to pay it; but until such an order is discharged the divorced wife cannot, in my opinion, prospectively deprive herself or be deprived of the benefit of the maintenance which the Court has ordered to be paid to her.

LOPES L.J. This case raises an important question. It is whether sums of money for the maintenance of a divorced wife ordered by the Court under the power conferred on the Court by s. 1 of 29 & 30 Vict. c. 32 are alienable. This Act was passed in 1866, and was intended to enlarge the power of the

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(1) 13 P. D. at p. 187.

(2) 15 Q. B. D. 239.

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Court in cases where the husband had no property on which the payment of a gross or annual sum could be secured. Sect. 32 of 20 & 21 Vict. c. 85, had said that the Court may, in pronouncing any decree for a dissolution of marriage, order that the husband shall, to the satisfaction of the Court, secure to the wife such gross or annual sum of money as to the Court may seem reasonable, and for that purpose may refer it to one of the conveyancing counsel of the Court of Chancery to settle and approve of a proper deed to be executed by all necessary parties. The Court under this section could only act where there was property upon which the sums of money ordered could be secured. I do not doubt but that the Court could have directed that the deed to be prepared should contain a provision against alienation or anticipation by the wife, but, in the absence of such a provision, the wife would no doubt be at liberty to alienate. There is a substantial difference between permanent alimony, which is ordered after a judicial separation, and maintenance, which is ordered after a divorce. There is, too, a substantial difference between the position of a wife who is judicially separated from her husband and a wife who is divorced. In the former case the relations of husband and wife continue, and cohabitation may at any time be resumed. In the latter case the woman is no longer the wife. She cannot again become the wife unless, after the decree is made absolute, she re-marries her former husband. She may marry again. He is not bound to support her. She cannot pledge her husband's credit even for necessaries. In point of fact, she becomes in every respect in the eye of the law a feme sole, with all the liabilities and all the privileges of a feme sole. It is plain that permanent alimony and maintenance must stand on a different footing. Permanent alimony has been held to be inalienable: *In re Robinson*. (1) Some of the grounds assigned for its being inalienable do not apply to maintenance. The Court has not the same control over maintenance. The Court can alter or take away alimony whenever it pleases. It is completely under the control of the Court. The Act with which we are

(1) 27 Ch. D. 160.

concerned in this case is the 29 & 30 Vict. c. 32. [The Lord Justice referred to the Act, and continued:—] Is the maintenance, which is to be for the support of the wife, alienable? After much consideration, I come to the conclusion it is not. The object of the Legislature was to compel the husband to make such a provision for the wife out of his monthly or weekly earnings for her support as would keep her respectable and be in substitution for that support to which she would have been entitled had she continued his wife, and which would not have been capable of being alienated or anticipated by her. It is during their joint lives to be paid at short intervals, and the Court keeps its hand upon the maintenance, because if the husband is unable to make the payments the Court can discharge or modify the order or temporarily suspend the same as to the whole or any part of the money ordered to be paid, and again revive the same order wholly or in part. Why should the Court reserve to itself a power to revive a modified or suspended order if the wife might have alienated her interest? The Court would not be concerned to restore an order made in favour of a wife to assist an assignee who could have no claim on the husband; nor do I think the Court would be justified in enforcing an order for maintenance against the husband on the application of the assignee. In my judgment, this maintenance is in the nature of a personal annuity, and, though in many respects unlike permanent alimony, is, very much for the same reasons as apply to permanent alimony, inalienable. The allowances in both cases are given to the wife, as in the case of half-pay officers in the army and navy, in order that she may maintain herself, and in their very nature are, in my judgment, inconsistent with alienation. I think the learned President was right, and that this maintenance cannot either be alienated or released.

KAY L.J. The question in this case is, whether a provision for the maintenance of a divorced wife, by periodical payments, which the Divorce Court, under the power conferred upon it by the Act of 1866, has ordered the former husband to pay, can be released to the former husband by the divorced wife.

By an Act of 1857 (20 & 21 Vict. c. 85), s. 32, the Court, in pronouncing a decree for dissolution of marriage, may order that the husband should secure, to the satisfaction of the Court, a gross or annual sum of money, and refer it to conveyancing counsel to settle a deed securing it upon the property of the divorced husband.

It was decided in *Harrison* v. *Harrison* (1) that where the Court had made an order under that statute for securing an annual sum to the divorced wife, but no deed had been executed, the provision by way of annuity was alienable. Cotton L.J. intimated in that case that a deed might be so framed as to make the annuity cease on alienation. As the grantee of such a provision is no longer a married woman, the only mode of doing this according to the ordinary law of property would be to limit the annuity so that it should altogether cease, or should go over to another person upon any attempt to alienate. Except in the case of a woman actually under coverture, the power of alienation, which is an incident of property, cannot otherwise be taken away from a person who is not under disability. The sole exceptions to this rule are in the case of a married woman who has separate property, as to which she is a feme sole, who may nevertheless be restrained from anticipating that property; and certain allowances, like the half-pay of officers in the army, which for public reasons are treated as inalienable.

Now, that being the state of the law, the Act of 1866 was passed.

It had been found that in many cases where divorce was decreed the divorced husband had no property on which a provision for the divorced wife could be secured. Accordingly statute 29 & 30 Vict. c. 32, s. 1, was passed, which has been read.

The power of making this kind of provision for the maintenance of a divorced wife is altogether a creature of statute. Neither Act says anything about its being inalienable. If the provision were a gross sum, or, it would seem, any sum by way of annuity, under the Act of 1857, it might be assigned,

(1) 13 P. D. 180.

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according to *Harrison* v. *Harrison* (1), unless the deed securing it were so framed as to make it cease on the attempt to alienate it.

Alimony, though permanent, has been held to be inalienable: *In re Robinson.* (2) But alimony is a provision for a wife, not for a woman who is no longer a wife. Moreover the Court which granted it has power to alter or even to take it away. Under the Act of 1866 there is a somewhat similar power as to maintenance. The Court has power to diminish the amount, or to discharge the order or suspend it in case the divorced husband should become unable to continue to pay it, but only in that event. The statutes do not in terms give any other power to interfere with it when once granted.

But the provision is intended for the personal "maintenance and support" of the divorced woman. In cases which come under the Act of 1866, and where the husband has no property on which it can be secured, it must often be the only thing the woman has to depend on for her livelihood.

Although I feel strongly the difficulty arising from the silence of the statutes upon the point, and also from the decision of this Court in *Harrison* v. *Harrison* (1), I am not disposed to differ from the judgment of the President in the present case, and I think that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *E. J. Moeran; Meredith, Roberts & Mills, for Sibly & Dickinson, Bristol; Rowcliffes, Rawle & Co.*

(1) 13 P. D. 180.

(2) 27 Ch. D. 160.

W. W. K.

THE MARÉCHAL SUCHET.

1896
June 29.

Admiralty — Salvage — Practice — Parties — Joinder of Plaintiffs — Separate Causes of Action—Rules of Supreme Court, 1883, *Order* XVI., *r.* 1; *Order* XVIII., *r.* 1.

The plaintiffs, the owners, masters, and crews of four steam-tugs, issued a writ of summons in rem in the Admiralty Division claiming reward for alleged salvage services rendered to a ship, her cargo and freight.

The owners of the ship, and of her cargo, appeared as defendants, under protest, and moved to set aside the writ, or, in the alternative, to strike out all the plaintiffs, except one, on the ground that their causes of action were separate and distinct:—

Held, by Gorell Barnes J., that the motion must be dismissed, the practice in Admiralty as to parties to the suit, and joinder of causes of action, not being affected by the provisions of Order XVI., r. 1, and Order XVIII., r. 1, of the Rules of the Supreme Court, 1883, as interpreted by *Smurthwaite* v. *Hannay* ([1894] A. C. 494).

Motion by defendants, the owners of the *Maréchal Suchet*, and of her cargo, to set aside the writ of summons in an action of salvage brought by the plaintiffs, the owners, masters, and crews of the steam-tugs *British King*, *Andrew Jolliffe*, *Sea King*, and *Great Emperor*, or, in the alternative, that all the plaintiffs, except one, might be struck out, on the ground that the respective plaintiffs could not properly sue in one action.

On June 11, 1896, the *Maréchal Suchet*, whilst proceeding to sea from the Mersey in tow of the tug *British King*, was found to be on fire. The ship was put about, towed back, and brought to anchor in the river. She was subsequently beached, and the fire put out. The plaintiffs alleged that they had rendered assistance, and on June 18 issued a writ of summons in rem out of the Liverpool District Registry against the owners of the ship, and the cargo now or lately laden therein, and the freight for the transportation thereof, claiming salvage reward.

Carver, for the defendants, in support of the motion. The causes of action of the owners, masters, and crews of the four tugs being separate and distinct, they cannot be joined in one action. The writ issued by the plaintiffs is, therefore, irregular and should be set aside. This is in accordance with the interpretation put upon Order XVI., r. 1, as to parties, and Order XVIII., r. 1, as to joinder of causes of action, by the House of Lords in *Smurthwaite* v. *Hannay*. (1)

Litigation has been commenced in the Liverpool County Court by another salvor, and it would be more convenient and less expensive for all the salvors to sue in the county court.

[GORELL BARNES J. Is there any power to consolidate the actions in a county court?]

No, not in the Admiralty sense; but they can be tried together.

[GORELL BARNES J. If separate actions had been brought in this Court, could they not be consolidated?]

No doubt; but the practice as to consolidation in this Court is for the convenience of trial, and implies that the actions consolidated have been properly brought in the first instance.

[GORELL BARNES J. If this motion succeeded, it would have the effect of altering the whole practice in Admiralty in matters of this kind.]

Possibly, but the Rules of the Supreme Court are binding in all Divisions of the High Court.

[Counsel referred also to *Peninsular and Oriental Steam Navigation Co.* v. *Tsune Kijima* (2); *Sadler* v. *Great Western Ry. Co.* (3); *Carter* v. *Rigby* (4); *Booth* v. *Briscoe.* (5)]

Butler Aspinall, for the plaintiffs, contra. By s. 21 of the Judicature Act, 1875, provision is made for the saving of the existing procedure in any of the courts whose jurisdiction is transferred when not inconsistent with the Act or the rules, and by Order LXXII., r. 2, of the Rules of the Supreme Court, the present procedure and practice remain in force, where no other provision is made by the Act or the rules.

The power given by the rules under the Judicature Acts to the Division now representing the courts of common law is new and could not be exercised by those courts before; but the practice of joining plaintiffs in salvage actions has long been in

(1) [1894] A. C. 494.
(2) [1895] A. C. 661.
(3) [1895] 2 Q. B. 688.
(4) [1896] 2 Q. B. 113.
(5) 2 Q. B. D. 496.

force in Admiralty: see *The Charles Adolphe* (1); *The Bartley* (2); *The Coromandel* (3); and in Coote's Admiralty Practice (4) it is stated, that "It is competent to any number of persons, having a common interest, to join in one action, and the Court favours such a practice." Instances are then cited as to wages actions, actions of damage by collision, and actions of salvage. The form of indorsement on the writ by salvors given in the Appendix to the Rules of the Supreme Court (5) also contemplates more than one plaintiff. From time immemorial seamen could join as co-plaintiffs in wages suits in Admiralty though not at law: *Hook* v. *Moreton*. (6) The provisions of Order XXII. as to tender have been held not to affect the Admiralty practice: *The Mona*. (7)

Carver, in reply. The object of the plaintiffs joining together in one action is in order to be able to claim bail for 1200*l*., and so get into the High Court, for each separate claim would be within the county court limit; but the rules do not allow this mode of defeating the county court jurisdiction in respect of the distinct claim of each of the four tugs, though, no doubt, the owners, master, and crew of one tug could, according to the practice in Admiralty, sue in one action.

GORELL BARNES J. [After stating the nature of the case, the learned judge continued:—] The motion is made with the object of preventing the four sets of plaintiffs from suing together in one action, and obtaining their trial in this Court. The real object of the motion is to force the plaintiffs to sue in the Liverpool County Court, because it is said that if each plaintiff sues separately his claim will come within the county court limit, whilst collectively the claims will exceed that amount. But even if the defendants could succeed in their motion, they could not compel the plaintiffs to go into the county court, and the only effect would be that four writs or more would be issued against the defendants in this Court, and they would have to pay extra costs by reason of the motion.

The important point to consider is, whether or not the

(1) Sw. 153.

(2) Sw. 198.

(3) Sw. 205.

(4) 2nd ed. 1869, p. 25.

(5) R. S. C. 1883, App. A, Part III. s. vi., No. 12.

(6) 1 Ld. Raym. 397.

(7) [1894] P. 265.

plaintiffs have the power to issue this writ collectively. On the defendants' part it is said that, according to the decision of *Smurthwaite* v. *Hannay* (1), the plaintiffs have no right to issue their writ against the defendants as they have done; and that, having regard to the construction put upon Order XVI., r. 1, by that decision, this writ is bad.

I do not think it necessary to say anything about the case of *Smurthwaite* v. *Hannay* (1), because, in my opinion, it has no application to this particular case, and to the form of suit of which this particular case is an instance. I do not think that Order XVI., r. 1, excludes the power of the plaintiffs to issue this writ. It is an enabling rule. In the old days, at common law, parties could not join together. The rule enabled certain plaintiffs to be joined together in a suit; but the Judicature Act of 1875, s. 21, and also Order LXXII., r. 2, leave untouched the practice of this Court in those respects in which it is not inconsistent with the rules made under the Judicature Acts. There is no doubt that the practice of this Court has been that all the persons interested in a salvage service might be joined together in one suit for the purpose of obtaining the reward for those services; and so also in collision cases, all those persons who had an interest in the ship which was damaged could be joined. In seamen's suits for wages the same thing applied. The practice is based on convenience. It would be mischievous, in my judgment, if the defendants' contention were correct, because I see nothing for it in that case but that the owners of separate parcels of goods damaged by a collision between two vessels (and there might be hundreds of such owners) would have to bring separate actions to recover their respective losses; and a similar course would have to be taken in all suits in this Court. That would have a most disastrous effect upon the work of the Court. It would greatly increase the cost of litigation in the Court, and, even if causes were consolidated at once after writ, it would be most unfortunate for unsuccessful defendants to have to pay the cost of large numbers of writs where one would have sufficed.

In the case which is now under consideration it is admitted

(1) [1894] A. C. 494.

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that if the plaintiffs commenced several separate suits the defendants would be entitled to apply to consolidate, and that this would be a proper case for a consolidation order to be made. When that is admitted, it follows that it is convenient for all the plaintiffs to sue together. That, in my judgment, is in accordance with the whole practice of the Court. That practice is not, I think, in any way taken away by the rule referred to and the decision upon it.

I dismiss the motion with costs.

Solicitors for plaintiffs: *Ewer & Neave, for H. J. Holme, Liverpool.*

Solicitors for defendants: *Rowcliffes, Rawle & Co., for Hill, Dickinson & Co., Liverpool.*

T. L. M.

[IN THE COURT OF APPEAL.]

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June 24.

THE COPERNICUS.

Admiralty—Insurance (Marine)—Freight—Commencement of Risk—Time of Engagement of Goods—Loading Port.

By a policy on freight "at and from any port or ports of loading on the west coast of South America to any port or ports of discharge in the United Kingdom" the freight was to be covered "from the time of the engagement of the goods."

Goods were engaged for the vessel which was to earn the freight, and were ready for shipment in her at the time of her loss, which occurred before she arrived at her first loading port on the west coast of South America.

Held, by the Court of Appeal (Lord Esher M.R., Kay and A. L. Smith L.JJ.), affirming the decision of Gorell Barnes J. (ante, p. 154), that the "engagement" clause must be construed with reference to the voyage described in the policy, and, therefore, as the vessel had not arrived at her first loading port on the west coast of South America, the risk had not attached.

APPEAL by plaintiffs, the Liverpool, Brazil, and River Plate Steam Navigation Company, Limited, owners of the steamship *Copernicus*, against a decision of Gorell Barnes J. (1) on the

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(1) Ante, p. 154.

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THE COPERNICUS.

construction of a policy on freight in favour of the defendant, Benjamin Holmes, an underwriter at Lloyd's.

By two policies of marine insurance, each covering 50,000*l.*, and dated respectively March 1 and November 28, 1895 (the latter policy being expressed to follow and succeed the former), the plaintiffs were insured by the defendant and other underwriters "on freight $\frac{\text{and}}{\text{or}}$ charges as interest may appear" by "steamer $\frac{\text{and}}{\text{or}}$ steamers belonging to, chartered by, or managed by" the plaintiffs, "lost or not lost at and from any port or ports of loading on the west coast of South America to any port or ports of discharge in the United Kingdom," or in certain other countries as therein described, the policies "to cover the freight from the time of the engagement of the goods or after a shipping order has been issued by the agent or his broker."

In September, 1895, offers of cargo were received from the plaintiffs' agents at Valparaiso for a voyage to the United Kingdom from ports on the west coast of South America, and for the purpose of loading this cargo the *Copernicus* on October 8 left Monte Video for Valparaiso, calling at Punta Arenas, in the Straits of Magellan, where she discharged and loaded a small quantity of coasting cargo, but since she left that place on October 16 she has not been heard of. When the *Copernicus* sailed from Punta Arenas there was cargo engaged for her at Valparaiso ready for shipment in her there, and cargo was also engaged for her at other ports on the west coast, the freight upon which would have amounted to 4900*l.*

On December 17, 1895, the plaintiffs declared this amount upon the policies, namely, 3700*l.* on the first (which exhausted that policy) and 1200*l.* on the second policy; but the defendant, who had underwritten the first policy for 580*l.* and the second for 500*l.*, refused to accept the declaration; and the plaintiffs thereupon sued him for 54*l.* 18*s.* 5*d.*, being his proportion of the alleged total loss of freight.

On April 27, 1896, Gorell Barnes J. gave judgment for the defendant on the ground that the "engagement clause" must be construed with reference to the voyage described in the policy, and, as the *Copernicus* had not, at the time of her loss, arrived at Valparaiso, her first loading port on the west coast of South America, the risk had not attached.

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The Copernicus.

On appeal:—

Joseph Walton, Q.C., and *T. G. Carver*, for the appellants (plaintiffs), argued, as in the Court below (1), that the risk began as soon as goods were engaged for the plaintiffs' steamer on which freight was payable from a port on the west coast of South America to a port in the United Kingdom, although the vessel was only on her way and had not yet arrived at her first port of loading.

[In addition to the cases cited in the Court below, the following were referred to. On the question of insurable interest: *Thompson* v. *Taylor* (2); *Truscott* v. *Christie*. (3)]

Sir Walter Phillimore and *J. A. Hamilton*, for the respondent, (defendant), were not called upon.

Lord Esher M.R. This is a question of insurance on freight. No doubt as soon as a shipowner has got a binding contract with somebody to put goods on board his ship, he has an insurable interest; but during the argument I had doubts whether the shipowners, who are the plaintiffs in this case, were in that position. However, the case has been fought in the Court below, and argued here on the assumption that they had an insurable interest, and, therefore, I shall take that to be so.

Now, the shipowner had insured his freight against loss; but when, how, and where? He had insured it against loss in particular places and for a particular time. He might have insured it against loss on the voyage from London to Valparaiso and back to London. If he had had a charterparty at the beginning of the time which would give him freight on goods to be put on board his ship at Valparaiso that would include into the time during which the loss might occur the time from London to Valparaiso, and if the ship was lost on the voyage out, he would lose that freight from Valparaiso home by reason of the ship being lost on the voyage out, and, therefore, he might insure it. But it is necessary to determine the period of time and the locality in which the risk or the loss is to occur. How is that done? By fixing the time when and the place where the risk of loss is to begin, and the time when and the place where it is to end. The fixing of the time when and the place where it is to begin is determined by the words "at and from." In this case it is not at and from London to Valparaiso and back to London. It is at and from Valparaiso. Therefore the loss must occur, if it is to be a loss, under the policy, at Valparaiso, or on the voyage home from Valparaiso to London. This loss did not occur within that time or within that space at all. It occurred before that time began, that is, before the ship reached Valparaiso. It is a loss which has occurred before the risk which is insured against can possibly attach. Under those circumstances the policy never did attach, and the decision of the learned judge in the Court below was right.

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(1) Ante, pp. 155, 156.

(2) 6 T. R. 478.

(3) 2 B. & B. 320.

KAY L.J. I must say that the terms of this policy are most puzzling. It seems to be a policy originally intended for insurance in respect of ship and goods, because all the words about ship and goods are left in, and then in the middle of the policy, and in, as we are told, a convenient space—which, as far as the wording of the policy goes, looks to me about as inconvenient a place as any that could be chosen—I find this: "On freight $\frac{\text{and}}{\text{or}}$ charges as interest may appear"; and then we are told that the policy does not relate to ship or goods at all, but that it is merely a policy on freight. However, this is plain in the first part of it, I think, that, whatever it is, it is a policy with the words "at and from" in it, and those words are most material. It is partly printed and partly written. The words "at and from" are printed, but are followed by written words which apply undoubtedly to the freight, because they are put in purposely in this policy which is to cover freight at risk "at and from any port or ports of loading on the west coast of South America to any port or ports of discharge in the United Kingdom or Continent," and so on.

So that what is written in is absolutely indisputable. It was a voyage from some port on the west coast of South America to some port in the United Kingdom or Continent; so that when you come to the insurable risk it must mean that those perils and risks insured against are perils and risks incurred during the voyage at and from a particular port—Valparaiso to Liverpool, which was the destination of this cargo. Then at the end comes this clause: "This policy to cover the freight from the time of the engagement of the goods, or after a shipping order has been issued by the agent or his broker." As A. L. Smith L.J. has pointed out, the second branch of the clause, "or after a shipping order has been issued by the agent or his broker," would certainly mean a shipping order issued after the ship had arrived at Valparaiso. Then does it not follow that the engagement of the goods must mean after the ship has arrived at Valparaiso? The ship was calling at other ports and making her way to Valparaiso. She was one of a line of steamers belonging to the plaintiffs, the assured in this case, and she was lost before ever she got to Valparaiso—somewhere about the Straits of Magellan. She was lost, as I understand, after touching at one of the ports, and on her way from the last port to Valparaiso; and it is said that this loss came under a loss of the freight because the goods were then engaged, and under this clause the policy had attached from the time when the goods were engaged. But it was pointed out in the argument that the effect of that is to make it a policy which might cover all risks on the ship from the moment she left England. Then counsel for the appellants went further and said, "Supposing the ship had been burnt in the West India Dock in England, and the goods had been engaged, though the freight could not be earned, the policy would have attached." He said, looking at the other side of the water, that if the goods had been engaged in the Pacific Islands, and were sent by ship to Valparaiso, if they were only to be shipped at Valparaiso by this ship, that the policy would attach; so that if the goods were lost on the voyage from the Pacific Islands to Valparaiso it would be a loss under the policy.

Now, when an argument leads to a conclusion which seems to me so extravagant as that, I think there must be some fallacy in it, and I think on the whole that I can point out the fallacy, which is this, that although it does not say when the engagement of the goods is to be, I do not think the parties contemplated the engagement of goods before the ship arrived at Valparaiso. I reconcile the two clauses by reading them thus: the voyage, the risks of which are to be insured against, is at and from Valparaiso. The policy is to cover the freight from the time of the engagement of the goods; and, reading the whole clause together, I think it means from the time of the engagement of the goods after the arrival of the ship at Valparaiso. That is the only way in which I can reconcile the two clauses. Although it is puzzling, I cannot see my way to differ from the decision of the learned judge of the Court below.

A. L. SMITH L.J. This is an action by an assured, a shipowner, on a Lloyd's policy on freight, and it is on the old printed form, filled up very much as ordinarily, though made to apply only to freight. It is simply a policy on freight, and the action is brought to recover freight to which the defendant says that the freight insured never was at risk within the terms of this policy. The question is, is this so? The first part of the policy is clear: the plaintiffs caused themselves to be insured, lost or not lost, at and from any port or ports of loading on the west coast of South America, in this case Valparaiso, to any port or ports of discharge in the United Kingdom on freight. That is the way I read the policy, and so reading it, when was the freight first at risk? Let us stop here for a moment. The freight was at risk at and from Valparaiso to the United Kingdom. It is impossible to hold that the freight was at risk before the ship arrived at Valparaiso ready to carry the goods "at and from" Valparaiso. What is now being attempted to be done by the assured against the underwriter is to enlarge his liability, and to make him cover the loss of the ship whilst going from this country to Valparaiso to fetch goods, and earn freight back "at and from" Valparaiso to this country. I say if you stop here in the policy, in my judgment the meaning is absolutely clear. In other words, when the ship gets to

Valparaiso, when she is at Valparaiso, and when she is coming home from Valparaiso to the United Kingdom, the freight covered by the policy is at risk, and not before.

Then counsel for the appellants points to another clause, I mean the " engagement " clause, and says the true meaning of this is, that it is to cover, not only the voyage at and from Valparaiso to this country, but while the ship is on her way out there to pick up goods. Now, is that the meaning? I do not think so at all. I agree with the learned judge in the Court below that the meaning of this policy is that it covers freight, not from the time of the engagement of the goods, no matter where the ship may be, and what risks the ship may have to undergo, for the purpose of getting to Valparaiso, to carry goods back and earn freight, but that the policy is to cover engaged freight at and from Valparaiso to the United Kingdom when the ship arrives at Valparaiso, and not before. At the time of the engagement of the goods the ship may not have got as far as Valparaiso. The policy is not to apply till the ship gets there. But if the goods are then engaged, then the freight on them is covered the moment the ship gets to Valparaiso, and then or after the shipping agent gets the shipping order. I think the appeal fails.

Appeal dismissed.

Solicitors for plaintiffs: *Stokes & Stokes, for Thorneley & Cameron, Liverpool.*

Solicitors for defendant: *Waltons, Johnson, Bubb & Whatton.*

T. L. M.

1896
March 27.

[IN THE CONSISTORY COURT OF WINCHESTER.]

IN THE MATTER OF A PETITION OF THE REVEREND ARTHUR LAWRENCE, RECTOR OF EVERSLEY, A DISCHARGED BANKRUPT.

Ecclesiastical Law—Jurisdiction—Sequestration—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 52—*Inability of Ordinary to relax Sequestration where Bankruptcy of Incumbent of sequestered Living discharged—Sequestration Act,* 1871 (34 & 35 *Vict. c.* 45), *ss.* 1–4.

The Ordinary has no jurisdiction to relax the sequestration of the benefice of a bankrupt clergyman if the debts provable in the bankruptcy are unpaid, although the bankrupt has obtained his order of discharge.

The 52nd section of the Bankruptcy Act, 1883, provides that "where a bankrupt is a beneficed clergyman the trustee may apply for a sequestration of the profits of the benefice, and the certificate of the appointment of the trustee shall be sufficient authority for the granting of sequestration without any writ or other proceeding, and the same shall accordingly be issued as on a writ of levari facias founded on a judgment against the bankrupt."

The incumbent of a benefice having been adjudged a bankrupt, a sequestration of the profits of the benefice was granted under the above section by the bishop of the diocese, who appointed a sequestrator of the benefice, and (after the sequestration had been in force for more than six months) a stipendiary curate to serve the cure, assigning to the latter a yearly stipend. Subsequently an order was made in the bankruptcy discharging the bankrupt, and he applied by petition to the Consistory Court of the diocese praying the Court to relax the sequestration, to direct the discharge of the sequestrator, and to revoke the appointment of the stipendiary curate. The trustee in the bankruptcy opposed the application, and objected that the debts provable in the bankruptcy still remained in part unsatisfied:—

Held, by the Chancellor of the Diocese of Winchester, that so much of the application as asked for the relaxation of the sequestration and the discharge of the sequestrator must be refused, as the Ecclesiastical Court had no jurisdiction to determine the question whether the discharge of the bankrupt acted as a satisfaction of the sequestration:

Held, also, by the same judge, that the remainder of the application ought to be referred to the bishop to be dealt with in his discretion.

ON March 11 last a petition, signed by the petitioner, the Reverend Arthur Lawrence, rector of the parish and parish church of Eversley, in the county of Hants and diocese of

Winchester, was brought into the registry, in which the petitioner alleged that he had been adjudged bankrupt on April 15, 1889; that by a deed-poll dated May 31, 1889, the late Right Reverend Edward Harold, Bishop of Winchester, upon application made to him by George Adams, the petitioner's trustee in bankruptcy, had sequestered "all and singular the tithes commutations of tithes rent-charges tenths oblations obventions fruits issues and profits whatsoever to the benefice and parish of Eversley or to the petitioner as rector thereof or otherwise howsoever belonging or appertaining," and appointed Harry Wilmot Lee, of No. 1, Sanctuary, in the City of Westminster, special sequestrator and collector of the said benefice; and that by a deed-poll dated March 12, 1890, the said Bishop of Winchester had appointed Horace Prescott Edge clerk to, and granted him licence and authority to perform, the office of stipendiary curate in, the parish of Eversley, assigning to him the yearly stipend of 200*l.*, to be paid quarterly, for serving the said cure. The petition further alleged, that "by an order made by a Divisional Court of Her Majesty's High Court of Justice in Bankruptcy dated December 14, 1894 and made in the matter of the said bankruptcy it was ordered that the petitioner be discharged as from May 9, 1894," and prayed that under the circumstances the Bishop of Winchester would be pleased, (1.) to relax the said sequestration, and to direct that the said H. W. Lee, the sequestrator, be discharged; (2.) to revoke the appointment of the said H. P. Edge as such stipendiary curate as aforesaid and the assignment of the said yearly stipend of 200*l.*

Notice of the petition was given by the registrar to the sequestrator and to the petitioner's trustee in bankruptcy, and on March 18 last the latter filed in the registry his objections to the prayer of the petition. These objections were in effect that the order of discharge referred to in the petition did not affect the sequestration, or the instruments under which the sequestrator and the stipendiary curate of Eversley were appointed, and that the debts provable in the bankruptcy of the petitioner had been satisfied to the extent of 8*s.* 9*d.* in the pound only, and such debts still remained unsatisfied to the extent of 1908*l.* 11*s.*, or 11*s.* 3*d.* in the pound, besides costs and charges paid or disbursed by the trustee in bankruptcy in relation to the petitioner's discharge, and there were no assets or property to satisfy the same other than and except the fruits, issues, and profits arising from the benefice of Eversley.

The petition now came on to be heard before the Chancellor of the Diocese of Winchester (Harold C. Gore-Browne, Esq.).

Arnold Statham, for the sequestrator, took a preliminary objection to the jurisdiction of the Court. Assuming the truth of the allegations in the petition, the Court has no jurisdiction to grant so much of the prayer of the petitioner as asks for the relaxation of the sequestration and the discharge of the sequestrator. The 52nd section of the Bankruptcy Act, 1883 (1), has conferred on the creditors of the bankruptcy a statutory right to obtain a sequestration of the bankrupt's benefice for the payment of his debts, and has given the Court no power to deprive the creditors of the rights so conferred on them. The order of the Divisional Court in Bankruptcy discharging the bankrupt has indeed given him a personal release, but in nowise operates to annul the sequestration, which will remain in full force and effect, quite independently of the action of this Court, until the debts and the expenses and charges properly incurred by the sequestrator, as well as the stipend due to the curate serving the cure, have been satisfied. That this is so is clear from the case of *Ex parte Chick, In re Meredith* (2)—a decision on a section of the Bankruptcy Act of 1869 corresponding in terms with the 52nd section of the Act of 1883.

Manby, for the trustee in bankruptcy, in objection to the jurisdiction. When once a sequestration has issued under the Bankruptcy Act, as in this case, the bishop issuing such sequestration is to a certain extent functus officio, and until the sequestration is satisfied according to its tenure by payment of the debts of the bankrupt neither the bishop nor his Court has jurisdiction on the petition of the debtor alone to relax it. A relaxation of the sequestration can only be issued at the instance

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(1) The section, so far as material, is set out in the head-note and the judgment.

(2) 11 Ch. D. 731.

1896

In re LAWRENCE.

of the debtor where the trustee in bankruptcy consents to that course being taken, or in case the Court having jurisdiction in the bankruptcy has intimated—as it has not done here—that the sequestration ought to be relaxed. In the present case the trustee in bankruptcy cannot consent to the prayer of the petition so far as concerns the relaxation of the sequestration or the discharge of the sequestrator being granted; so large a portion of the debts still remaining unsatisfied.

St. Gerrans, for the petitioner, in support of the jurisdiction. The petitioner having obtained an unconditional discharge, this Court has jurisdiction to relax the sequestration and to take all consequent steps whenever it thinks fit: the intention of the present Bankruptcy Act being that, on an unconditional discharge being granted to the debtor, he should be relieved from the debts provable in the bankruptcy, and be in the same position as if the bankruptcy had been annulled under the former Bankruptcy Act of 1869. [He referred to *In re Pettits' Estate* (1); *Ebbs* v. *Boulnois* (2); *In re Gold* (3); *Heather* v. *Webb* (4); *Thompson* v. *Cohen.* (5)] This intention "to give the debtor a fresh start in life" would be defeated if the Court refused to set aside the sequestration and all future proceedings under it.

As to the second portion of the prayer of the petition, it is submitted that the petitioner, having received his discharge, ought to be allowed to himself again officiate in his parish, and that in the circumstances the benefice ought no longer to bear the charges of paying the stipendiary curate appointed by the late Bishop of Winchester under s. 1 of the Sequestration Act, 1871.

THE CHANCELLOR. This is an application by the incumbent of a benefice in the diocese of Winchester, who was made a bankrupt in the year 1889 and obtained his discharge in the year 1894, to have the sequestration of his benefice relaxed, the sequestrator discharged, and the appointment of a stipendiary curate appointed by the bishop to serve the benefice revoked.

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(1) 1 Ch. D. 478.

(2) L. R. 10 Ch. 479.

(3) 8 Morell's Bank. Cas. 45.

(4) 2 C. P. D. 1.

(5) L. R. 7 Q. B. 527.

1896

In re LAWRENCE.

The Chancellor.

It has been contended before me, on behalf of the applicant, that on being discharged he became entitled to have the sequestration relaxed and the sequestrator discharged. The trustee in the bankruptcy has entered an appearance in opposition to the application, and has objected that the debts provable in the bankruptcy have been satisfied to the extent of 8*s.* 9*d.* in the pound only; whilst the sequestrator has informed the Court that the applicant has issued notices to the tithepayers in the parish warning them not to make any payments of the profits of the benefice to the sequestrator, and that he has not in hand at present sufficient money to pay the curate's stipend.

This Court has power to examine the sequestrator's accounts, and, on the application of the trustee in bankruptcy or a judgment creditor at whose instance the sequestration has been obtained, to relax the sequestration and direct the sequestrator to be discharged; and it may indeed be that if the Court knows clearly that the debts in respect of which the sequestration has been issued have been paid in full the Court would, even on the application of the beneficed clerk concerned, order the sequestration to be relaxed if the judgment creditor or the trustee in bankruptcy capriciously refused to concur.

Where, however, there is a bonâ fide dispute as to whether the judgment debt is paid, or whether the law has operated to satisfy the sequestration, the matter seems to me to be no longer within the province of the Ecclesiastical Court, but the question ought to be left to be decided by the Court out of which in cases under the common law the writ of sequestrari facias de bonis ecclesiasticis would have issued, and from which perhaps such writ may in the present case be assumed to have issued.

Formerly, under the common law, when judgment for a debt was entered against a beneficed clerk, and a return was made by the sheriff that the defendant had no lay fee, a writ of sequestrari facias de bonis ecclesiasticis—a writ which was in the nature of a levari facias—went to the bishop of the diocese commanding him to enter into the benefice and take and sequester the same until he should have levied the amount of the judgment out of the rents, tithes, and other profits of the benefice.

By the Bankruptcy Acts of 1869 (1) and 1883, an alteration in certain cases was made, and it is now provided, by the 52nd section of the last-mentioned Act, that where a bankrupt is a beneficed clergyman "the trustee"—that is the trustee in bankruptcy—"may apply for a sequestration of the profits of the benefice, and the certificate of the appointment of the trustee shall be sufficient authority for the granting of sequestration without any writ or other proceeding, and the same shall accordingly be issued as on a writ of levari facias founded on a judgment against the bankrupt."

By virtue of the provisions of the Sequestration Act, 1871, the incumbent whose living is sequestrated suffers under great disabilities so long as the sequestration is in force, and this is especially so where the bishop, under s. 1 of that Act, "takes order for the due performance of the services of the church of the benefice," and appoints a curate other than the incumbent. It is therefore important for the incumbent to have the sequestration set aside as soon as possible; and if the bankruptcy in connection with which the sequestration had issued were annulled, and the jurisdiction of the temporal court having cognizance of the bankruptcy had thus ceased, this Court might perhaps reasonably be asked to hold that the assumed writ of sequestrari facias or levari facias was satisfied, and that the application to relax the sequestration ought to be granted. But as the petitioner is only discharged from the bankruptcy, and the jurisdiction of the Court in bankruptcy still continues, the question of law that has been raised seems to me to be one as to which this Court, having no jurisdiction in the matter, ought not to pronounce an opinion.

The petition will accordingly be dismissed as to the part of the prayer which prays that the sequestration should be relaxed and the sequestrator be directed to be discharged. I think the sequestrator acted rightly in putting in an appearance; for, even had the Court seen its way to relax the sequestration, it would certainly have required that the notices given by the

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(1) 32 & 33 Vict. c. 71, s. 88.

1896

In re LAWRENCE.

The Chancellor.

petitioner to the tithepayers should have been withdrawn, and that the curate's stipend until his appointment had ceased should have been provided for. The sequestrator's costs must be added to the charges he is entitled to take from the profits of the benefice received by him. The counsel for the petitioner objected to the costs of the trustee in bankruptcy being paid by the petitioner, on the ground that the petition was presented ex parte. It is, however, not the practice of this Court to hear such petitions without seeing that all parties interested are cited, or otherwise given an opportunity of appearing. The petitioner will, therefore, have to pay the taxed costs of the trustee in bankruptcy.

The portion of the petition relating to the revocation of the curate's appointment will be referred to the bishop to deal with in his discretion. Now that the petitioner is no longer an undischarged bankrupt, the scandal to the parish will, if he is allowed to resume his ministry, not be the same as it formerly was; and in most other professions a discharge from bankruptcy does give the person discharged an opportunity of recovering his position to some extent. I can, therefore, commend the prayer of the petition as to the revocation of the curate's appointment to the bishop's consideration; but it must be understood that whatever the bishop may do in the matter will be entirely ex gratiâ on his lordship's part. I understood that the petitioner undertakes that the notices he has given to the tithepayers not to pay their tithes to the sequestrator shall be withdrawn.

Solicitors for petitioner: *Withalls & Belton.*

Solicitors for sequestrator: *Lee, Bolton & Lee.*

Solicitors for trustee in bankruptcy: *Coode, Kingdon & Cotton.*

C. F. J.

[DIVISIONAL COURT.]

1896
June 7;
July 7.

ELLIS *v.* ELLIS.

Husband and Wife—Jurisdiction of Justices—Persistent Cruelty causing Wife to live separately — Wilful Neglect to provide reasonable Maintenance causing Wife to live separately—Limit of Time for Proceeding—Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 39), *ss.* 4, 8—*Summary Jurisdiction Act,* 1848 (11 *&* 12 *Vict. c.* 43), *s.* 11.

By the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 4, "Any married woman . . . . whose husband shall have been guilty of persistent cruelty to her, or wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain, and shall by such cruelty or neglect have caused her to leave and live separately and apart from him, may apply to any court of summary jurisdiction . . . . for an order or orders under this Act."

By s. 8, "All applications under this Act shall be made in accordance with the Summary Jurisdiction Acts."

By the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11, "In all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made, and such information shall be laid, within six calendar months from the time when the matter of such complaint or information respectively arose."

Persistent cruelty by a husband to a wife, and wilful neglect by him to provide reasonable maintenance for her, in consequence of which he causes her to leave and live separately and apart from him, within the meaning of s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, are not continuing offences. The limit of time imposed by the reference in s. 8 to s. 11 of the Summary Jurisdiction Act, 1848, applies, and the complaint must in each case be made within six calendar months of the offence.

APPEAL from an order made by the stipendiary magistrate for Greenwich under the Summary Jurisdiction (Married Women) Act, 1895. (1)

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(1) By the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 4, "Any married woman whose husband shall have been convicted summarily of an aggravated assault upon her within the meaning of section forty-three of the Offences against the Person Act, 1861, or whose husband shall have been convicted upon indictment of an assault upon her, and sentenced to pay a fine of more than five pounds, or to a term of imprisonment exceeding two months, or whose husband shall have deserted her, or whose husband shall have been guilty of persistent cruelty to her, or wilful

The order found that James Ellis, the appellant, had been guilty of persistent cruelty to Laura Winn Ellis, his wife, the respondent, and had wilfully neglected to provide reasonable maintenance for her, and had by such cruelty and neglect caused her to leave and live separately and apart from him, and directed that she should no longer be bound to cohabit with him, that he should pay her 1*l.* 10*s.* a week, and the costs of the application, and that she should have the custody of the child of the marriage.

It appeared that in 1889 the respondent left the appellant in consequence of his conduct, taking the child with her, and did not return to cohabitation. The order appealed against was was made in 1896. The ground of appeal was that "the complaint had not been made within six calendar months from the time when the matter of complaint arose, within

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neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain, and shall by such cruelty or neglect have caused her to leave and live separately and apart from him, may apply to any court of summary jurisdiction . . . . for an order or orders under this Act."

Sect. 5: "The court of summary jurisdiction to which any application under this Act is made may make an order containing all or any of the provisions following, viz.:—

"(*a*) A provision that the applicant be no longer bound to cohabit with her husband (which provision while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty):

"(*b*) A provision that the legal custody of any children of the marriage between the applicant and her husband, while under the age of sixteen years, be committed to the applicant:

"(*c*) A provision that the husband shall pay to the applicant personally, or for her use, to any officer of the Court or third person on her behalf, such weekly sum not exceeding two pounds as the Court shall, having regard to the means both of the husband and wife, consider reasonable:

"(*d*) A provision for payment by the applicant or the husband, or both of them, of the costs of the Court and such reasonable costs of either of the parties as the Court may think fit."

Sect. 8: "All applications under this Act shall be made in accordance with the Summary Jurisdiction Acts."

By the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11, "In all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made, and such information shall be laid, within six calendar months from the time when the matter of such complaint or information respectively arose."

the meaning of s. 11 of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43)." (1)

Frank Gover, for the appellant. The appeal should succeed. The magistrate had no jurisdiction to make the order. By s. 8 of the Act, s. 11 of the Summary Jurisdiction Act, 1848, is incorporated. The complaints must, therefore, be made within six months of the offences, and the wife is out of time. [He referred to *Reg.* v. *Slade*. (2)]

Lewis Thomas, for the respondent. The appeal should be dismissed. The offences are continuing offences. [He referred to *Reg.* v. *Evans* (3); *Reg.* v. *Birwistle* (4); *Reeve* v. *Yeates*. (5)]

Cur. adv. vult.

July 7. SIR F. H. JEUNE, PRESIDENT. The order made by the learned magistrate states, that the complaint that the appellant has been guilty of persistent cruelty to the respondent, and wilfully neglected to provide reasonable maintenance for her, and has by such cruelty and neglect caused her to leave and live separately from him, is true. The respondent finally left the appellant in August, 1889. It was suggested before us, and the evidence appears to shew, that the appellant has neglected to maintain the respondent since she left him. This, however, seems to me to be immaterial. The "neglect to maintain" referred to in the 4th section of the Summary Jurisdiction (Married Women) Act, 1895, is neglect antecedent to its effect of the wife leaving her husband; and it is such neglect, and such neglect only, that the magistrate has found to be proved. The only question, therefore, raised in this case is, whether the offences proved are continuing offences, so that the limit of time imposed by the reference to the Summary Jurisdiction Acts contained in s. 8 does not apply.

I am of opinion that they are not continuing offences. It

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(1) It was also alleged, as a ground of appeal, that there was no evidence of the offences charged; but as this matter is not dealt with in the judgments, it has been thought unnecessary to report the facts and arguments relating to it.

(2) [1895] 2 Q. B. 247.

(3) [1896] 1 Q. B. 228.

(4) 58 L. J. (M.C.) 158.

(5) 1 H. & C. 435.

1896

ELLIS
v.
ELLIS.

The President.

appears to me clear that when the course of conduct, consisting either of persistent cruelty, or neglect to maintain, produces the result of causing the wife to leave her husband and live apart from him, the offence contemplated by the Act is complete.

The test whether an offence is to be treated in law as continuous is, I think, whether its gravamen is to be found in something which the offender can, at will, discontinue. The gravamen of desertion is placed by the matrimonial law, not so much in one spouse leaving the other, as in his or her persisting in separation. But the gravamen of offences of such cruelty, or neglect, on the part of a husband, as drive a wife from her home, consists in the cruelty or neglect carried to that point of aggravation. A husband whose misconduct has been so serious as to produce such a result, is, I think, deemed by this Act to be guilty of a complete offence as soon as the result ensues.

There is not, so far as I know, any authority on the point. The case of *Reeve* v. *Yeates* (1), referred to in argument, presents some, but not a close, analogy. That case was decided on the words of 5 Geo. 4, c. 83, s. 4, which makes "every person running away and leaving his wife or his or her children chargeable to the parish" guilty of an offence. It was held by Pollock C.B. and Martin B., Bramwell B. dissenting, that the limit of six months ran not from the time of leaving her, but from the time of the chargeability arising. But it was not doubted that this period of limitation did then begin. So here, I think, it begins when the husband's conduct causes his wife to leave him.

In allowing the summary remedy provided for by this Act, the Legislature, in such cases as the present, has thought right to prescribe that complaint shall be made within six months. But if that time be exceeded, there remains the right to come to this Court, which can give relief, unless there has been undue delay.

The appeal must, therefore, be allowed; but I think that the wife's costs should be paid by the husband.

(1) 1 H. & C. 435.

Gorell Barnes J. I agree. The husband is proved to have been "guilty of persistent cruelty" to his wife, and by such cruelty to have "caused" her "to live separately and apart from him," within the meaning of s. 4 of the Summary Jurisdiction (Married Women) Act, 1895; but the cruelty and separation took place in 1889, and the application was not made till 1896. The question, therefore, arises whether or not, having regard to the 8th section, which says that "all applications shall be made in accordance with the Summary Jurisdiction Acts," that is, here, "within six months of that which is complained of," the magistrate had jurisdiction to make the order.

I am of opinion that he had not jurisdiction to make it, inasmuch as the two matters, which constitute the statutory offence, the cruelty and the separation, occurred more than six months before the application. The wife is out of time under the Act, though she has still, of course, her remedy for a judicial separation. The statutory offence is not, in my opinion, like desertion, a continuing offence. Desertion can be put an end to at any time by the return to cohabitation of whichever of the spouses has deserted the other. But what is complained of here took place once for all in 1889, when the cruelty and its consequence occurred.

The case is the same as regards the other statutory offence charged, that of "wilful neglect to provide reasonable maintenance causing the wife to live apart."

The appeal must, therefore, be allowed.

Solicitors for appellant: *Frederick Kent & Co.*

Solicitors for respondent: *Busk & Mellor.*

H. D. W.

1896
June 18.

[IN THE CONSISTORY COURT OF NORWICH.]

THE RECTOR AND CHURCHWARDEN OF BARSHAM, SUFFOLK *v.* THE PARISHIONERS AND INHABITANTS OF THE SAME.

Ecclesiastical Law—Faculty—Confirmatory Faculty for Retention on Chancel Screen of Carved Figures representing Our Lord on the Cross, the Virgin Mary, and St. John—Representation of Historical Scene not likely to be Object of Superstitious Reverence.

A figure of Our Lord upon the Cross was in 1880 placed in a parish church above, and on the centre of the screen separating the chancel from the nave; and in 1893 there were placed on one side thereof a figure of the Virgin Mary, and on the other side thereof a figure of St. John. All the figures were carved in wood, were about 2 ft. 9 in. in height, the central figure being rather higher than the two others, and all had been placed in the church without the sanction of a faculty. There was not in the church anything of the nature of a rood-loft or rood-stairs, and no candles were round or in front of the figures. In 1896 the rector and churchwarden of the parish instituted a cause of faculty praying the Ordinary to authorize by faculty the retention of the three figures on the screen, and filed affidavits stating that the services of the church had been conducted in accordance with the directions of the Book of Common Prayer, and that there was not and had not been anything in the said services or in the attitude of those attending the services to indicate or suggest any probability of worship, adoration, or any superstitious reverence being paid to the figures on the screen. No person appeared to oppose the grant of the faculty.

The Chancellor of the Diocese of Norwich ordered the faculty to issue as prayed.

THIS was a cause of faculty instituted on behalf of the Rev. Allan Coates, Clerk in Holy Orders, rector of the parish of Barsham, in the county of Suffolk and diocese of Norwich, and Charles Taylor, churchwarden of the same parish, against the parishioners and inhabitants of that parish in special, and all others in general having interest, for the purpose of obtaining a faculty confirming the hanging of four bells in the tower of the parish church of Barsham aforesaid, and the erection of certain figures on the screen between the chancel and the nave of the said church.

The 2nd, 3rd, and 4th paragraphs of the petition related more especially to the description of the chancel screen and the figures in question, and to the introduction of the latter into the church, and were, so far as material, in the following terms :—

"2. There is and has been for upwards of 250 years in the said church a screen of wood between the chancel and the nave, having open panels, surmounted by light tracery, and in no way interfering with the transit of sound from the chancel to the body of the church, or with the view of the said chancel.

"3. Since the year 1880 there has been a figure of Our Lord above the said screen, and in the centre thereof; and on one side thereof a figure of the Virgin Mary, and on the other side a figure of St. John has been recently placed, that is to say, on or about August 20, 1893. The said figures are of wood, and are shewn upon the photograph annexed to the petition and marked 'A.'

"4. No faculty has yet been obtained for the alterations and additions mentioned in paragraph 2 of this petition." (1)

The petition concluded with a prayer that the Court would issue a licence or faculty to the petitioners authorizing and confirming the placing of the said bells in the said tower and of the said figures on the screen.

May 7. *Harold Hardy*, on behalf of the petitioners, now moved the Chancellor of the Diocese of Norwich (2) in Court to decree the issue of the usual citation with intimation in the suit. The Court has jurisdiction to decree the issue of the citation. [THE CHANCELLOR. I should state that the Court has not required the present motion to be made before it from any doubt as to its jurisdiction to grant the faculty on the necessary facts being hereafter proved, but because it understood that it

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(1) Subsequent paragraphs of the petition alleged that the vestry of the parish had unanimously passed a resolution in favour of a confirmatory faculty being applied for for the retention in the church of the bells and the figures on the chancel screen, and that their entire cost had already been defrayed, and no further expense was outstanding in respect thereof.

(2) T. C. Blofeld, Esq.

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would be more convenient to have it decided before the hearing of the suit whether the faculty asked for ought, as a matter of discretion, to be granted in the circumstances existing in the case.] The petitioners are prepared with evidence to satisfy the Court that a confirmatory faculty ought to be granted for the retention in their present position of the three figures of Our Lord, the Virgin Mary, and St. John. Similar figures to these placed, with other figures, on a beam across the chancel of the parish church of St. John, Timberhill, were, indeed, decided to be unlawful ornaments by this Court in *The Vicar of St. John, Timberhill* v. *The Rectors of the Same* (1); but the circumstances before the Court in that case were very different to those present here, and rightly led the Court to the conclusion that there was a probability of the figures then sought to be sanctioned being made the subject of superstitious reverence, and unable to pass the test applied in respect of the reredos in Exeter Cathedral in *Phillpotts* v. *Boyd* (2), and since considered to be applicable in the case of other similar erections in churches, including the placing of figures on chancel screens. [He referred to *Reg.* v. *The Bishop of London* (3); *Clifton* v. *Ridsdale* (4); *In re St. Lawrence, Pittington* (5); *Hughes* v. *Edwards*. (6)] If this test is applied to the facts in this case, as the promoters submit ought to be done, it will be found that the figures on the screen are not likely to be abused and are not unlawful. The chancel screen in this case is not a rood-loft, and there are no rood-stairs, and no evidence can be given of any service having been performed in connection with the figures on the screen, as was undoubtedly the case in the St. John, Timberhill, case—*The Vicar of St. John, Timberhill* v. *The Rectors of the Same*. (1) Further, this case differs from the case of *Clifton* v. *Ridsdale* (4), where an isolated figure of Our Lord on the Cross above the chancel screen in St. Peter's Church, Folkestone, was held illegal, for not only do the figures in question in this case form an historical representation, but it was proved in *Clifton* v. *Ridsdale* (4) that there were on the

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(1) [1895] P. 71.
(2) L. R. 6 P. C. 435.
(3) 24 Q. B. D. 213, 237.
(4) 1 P. D. 316; 2 P. D. 276.
(5) 5 P. D. 131, 134.
(6) 2 P. D. 361, 369.

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chancel screen, in that case on either side of the crucifix, candlesticks with candles lighted during divine service, and in the church a set of delineations known as "Stations of the Cross and Passion," commonly in use in Roman Catholic churches, but decorations forbidden by law in churches of the Church of England. All these circumstances pointed to the probability of the crucifix there being abused by superstitious reverence, and explain the decision come to by the Dean of the Arches in that case—a decision which ought in no way to fetter the discretion of the Court to decree a confirmatory faculty for the figures on this chancel screen, after the motion now made to the Court to issue the usual citation has been granted and the citation duly returned.

Cur. adv. vult.

May 29. THE CHANCELLOR. This is a petition by the rector and the churchwarden of Barsham, in the county of Suffolk, for a citation to issue calling upon the parishioners and others concerned to shew cause why a faculty should not be granted to confirm the hanging of bells in the tower, and the erection of a figure of Our Lord on the Cross upon the centre of the chancel screen of the parish church of Barsham, with the figures of the Virgin Mary on one side of it and of St. John on the other.

For the present purpose I must assume that the facts alleged in the petition are proved.

It appears, then, that the screen is a light open one of wood between the nave and the chancel of the church, and is about 250 years old, and therefore of post-Reformation date; that all three figures are of wood; that that of Our Lord was erected in 1880, and the other two in 1893; that no faculty has been obtained for any of them, and that the vestry of the parish unanimously support this application.

I may repeat here what I said in the Timberhill case—*The Vicar of St. John, Timberhill* v. *The Rectors of the Same* (1)—as to the necessity of obtaining a faculty before any important alteration in or addition to a church is carried out; and that

(1) [1895] P. 71.

where that has not been done the Court should exercise great caution in granting a confirming faculty.

A photograph of the screen, with the figures on it, was put in; and I was informed that the latter were about 2 ft. 9 in. high, that of Our Lord being rather higher than the others; that the figures were handsomely carved in oak, without paint or colouring, except a little gilding about the base; that there was nothing in the nature of a rood-loft or rood-stairs; that there were no candles round or in front of the figures; and that there was nothing in the services of the church or in the conduct of the worshippers there tending to shew a probability that the figures would be the object of superstitious reverence. Of course, I understand superstitious reverence in the sense expounded by Lord Penzance in *Clifton* v. *Ridsdale*. (1)

As to carved images in churches, there can be no doubt that the statute 3 & 4 Edw. 6, c. 10, following the injunctions of 1547, directed their destruction; but, as pointed out by the Privy Council in *Phillpotts* v. *Boyd* (2), citing the previous judgment of the same Court in *Westerton* v. *Liddell* (3), that Act "related to the destruction of images already ordered to be removed, but which either had not been removed, or having been so, were still retained for private devotion or worship"; and it was therefore expressly held that the efficacy of the Act was spent upon the definite purpose to which it was directed, and that it did not make provision in respect of the subsequent use or abuse of any other images.

It was accordingly argued before me by Mr. Harold Hardy, as counsel for the petitioners, that the question of the legality of these figures on the screen depended, not upon statute law, but upon the tests applied in *Phillpotts* v. *Boyd* (4), namely, for what purpose were they put up, to what end are they used, and are they in danger of being abused? And he further cited the opinion of Lindley L.J. in *Reg.* v. *The Bishop of London* (5), where that learned judge states the question as to the legality of images in a church to be "whether they do or do not, or will or will not, encourage or lead to idolatrous or superstitious worship in the place where they are, or are to be put."

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(1) 1 P. D. 316.

(2) L. R. 6 P. C. 435, at p. 461.

(3) Special Report by Moore.

(4) L. R. 6 P. C. 435.

(5) 24 Q. B. D. 237.

In *Clifton* v. *Ridsdale* (1), which was affirmed on appeal (2), it was held by Lord Penzance that a crucifix on the top of a screen, being an object which "formed an ordinary feature in the parish churches before the Reformation," "not as a mere architectural ornament, but as an object of reverence and adoration," was illegal; but the judgment affirming this decision on appeal was expressly based on the fact that the church in question was one in which were found, not merely an illuminated crucifix, but also those Stations of the Cross, and other acts in the conduct of the services the illegality of which was not disputed. In *Hughes* v. *Edwards* (3), in the Court of Arches, and in two cases in Consistory Courts, namely, *In re Lawrence, Pittington* (4), and *The Vicar of St. John Pendlebury* v. *The Parishioners of the Same* (5), a distinction is drawn between isolated figures and historical groups, and it is pointed out that the latter may be lawful where the former, as more likely to be abused, would not be so.

In my judgment in the Timberhill case—*The Vicar of St. John, Timberhill* v. *The Rectors of the Same* (6)—to which I entirely adhere, I pointed out that before the Reformation roods had been greatly abused, and that consequently in the time of Elizabeth they were abolished; and I held that to erect a rood now, after an interval of three centuries, of exactly the old pattern, in exactly the same place as before, and for no purpose arising out of the authorized services of the church, was ipso facto likely to cause abuse; and that further, in the particular case then before me, where the Sarum use was in part adopted, and certain services were performed in the rood-loft on Palm Sunday, there were "circumstances" such as those mentioned in *Clifton* v. *Ridsdale* (1), which shewed that there was danger of superstitious reverence being paid to the images.

In the present case the figures in question constitute a group commemorating a well-known scene in sacred history, namely,

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(1) 1 P. D. 316.
(2) 2 P. D. 276.
(3) 2 P. D. 361.
(4) 5 P. D. 131.
(5) [1895] P. 178.
(6) [1895] P. 71.

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Our Saviour on the Cross commending his mother to the care of the disciple whom he loved; and there is no attempt to reproduce the rood or rood-loft with its candles and worship. No doubt as regards the resemblance of the figures to those placed in pre-Reformation times above the rood-lofts, the case comes somewhat near the line; but it differs greatly from the Timberhill case—*The Vicar of St. John, Timberhill* v. *The Rectors of the Same* (1); and I cannot hold that these figures, simply placed as they are upon the chancel screen, are of themselves so likely to become objects of superstitious reverence in the present day as to call upon me to refuse to allow a citation to issue. It must be understood, however, that upon the hearing I shall require proof on affidavit that the services of the church are conducted in accordance with the directions of the Book of Common Prayer, and that there is, and has been, nothing in those services, or in the attitude of those who attend them, to indicate any probability of superstitious reverence being paid to these figures; and, of course, if any opposition is made to the granting of the faculty, I shall be prepared to hear it with an unbiassed mind. If the faculty should be granted, it would be on the understanding that no superstitious reverence is paid to these images; and if hereafter any such superstitious reverence should be paid, then the Court would be bound on proper application to order their removal. No question arises as to the bells. The citation, therefore, may issue as prayed.

The citation having issued as decreed, the solicitors for the petitioners on June 4 last returned the citation into Court with proof of publication thereof, and subsequently brought in affidavits in support of the petition. In one of such affidavits the rector of the parish deposed that during the time—six years—he had been rector the services of the church had been conducted in accordance with the directions of the Book of Common Prayer, and to the best of his knowledge and information there was not and had not been anything in the said services or in the attitude of those who attended the same to indicate or suggest any probability of worship, adoration, or any super-

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(1) [1895] P. 71.

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stitious reverence whatever being paid to the figures upon the chancel screen in the church, and mentioned in the above-named petition.

Another affidavit to the same effect was made by the other petitioner, Charles Taylor, who had resided in the parish for six years.

June 18. On this day the cause came on for hearing on the affidavits brought in. No opponent appeared to oppose, and on motion made on behalf of the petitioners the Chancellor of the diocese decreed the faculty to issue as prayed. (1)

Solicitors for petitioners: *Brooks, Jenkins & Co.*

C. F. J.

[IN THE COURT OF APPEAL.]

THOMSON *v.* THOMSON AND RODSCHINKA.

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March 30; *April* 23.
C. A.
June 10.

Divorce—Variation of Settlements—Application by Executor of deceased Petitioner—Matrimonial Causes Act, 1859 (22 *&* 23 *Vict. c.* 61), *s.* 5—*Matrimonial Causes Act,* 1878 (41 *&* 42 *Vict. c.* 19), *s.* 3—*Restraint on Anticipation—Conveyancing and Law of Property Act,* 1881 (44 *&* 45 *Vict. c.* 41), *s.* 39.

Held, by the Court of Appeal, affirming the decision of the President, that the power of altering marriage settlements given to the Court by s. 5 of the Matrimonial Causes Act, 1859, and s. 3 of the Matrimonial Causes Act, 1878, is limited to such alterations as are for the personal benefit of the husband, wife, or children of the marriage. Where, therefore, a petitioner dies after obtaining a decree absolute for dissolution of the marriage and after presenting a petition for variation of the marriage settlement, and there are no children of the marriage, the petition for variation abates by the death of the petitioner, and the proceedings cannot be continued by his personal representatives for the benefit of his estate.

On a decree nisi for divorce being made on the petition of the husband, terms were arranged that the petitioner should secure the respondent 120*l.* a year for life, and that she should consent to their marriage settlement being annulled:—

Held, by the Court of Appeal, that, as the respondent was by the marriage settlement restrained from anticipation, this agreement was not

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(1) The Court was held in the Bauchun (or Beauchamp) Chapel in the Cathedral of Norwich.

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binding on her, and that the objection could not be remedied under the power given to the Court by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 39.

APPEAL from the decision of a registrar dismissing a summons calling on the respondent to shew cause why the petitioner's executor should not be made a party to the suit in place of the petitioner for the purpose of prosecuting the suit and for the purpose of carrying into effect certain terms come to between the counsel for the petitioner and the respondent and filed in court. The hearing of the summons on appeal had been adjourned by the President into court.

In this case the petitioner, the husband, presented a petition for the dissolution of his marriage with the respondent. He obtained a decree nisi on June 14, 1895. On the same day the following terms were entered into between the parties by their respective counsel: "The petitioner will settle sufficient funds to secure to the respondent 120*l.* per annum for her life, and the respondent will consent to the marriage settlement being set aside and the whole of the trust funds (subject to the above settlements) being re-conveyed to the petitioner absolutely. Respondent will accept the same trustees for the proposed settlement as those of the existing settlement. 120*l.* a year to be paid as alimony till the execution of the settlement."

The marriage settlement referred to in the above terms was an ante-nuptial settlement made on April 21, 1873, and by it certain funds amounting to 10,000*l.* were settled by the petitioner on trust to pay the income to himself for life, and after his decease to the wife "during her life for her separate use, and so that she shall not have power while under coverture to dispose thereof in the way of anticipation," and after the determination of those trusts upon trusts for the issue of the marriage, and in default of issue, in trust for the petitioner, his executors, administrators and assigns. There were no children of the marriage.

The decree was made absolute on January 13, 1896.

On February 7, 1896, the petitioner presented a petition to set aside the settlement, and served it on the 22nd. On February 27, 1896, before any further step had been taken, the petitioner died; the present summons was subsequently taken out by his executor.

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Bayford, Q.C., and *Bargrave Deane*, for the applicant. The Court has power under 22 & 23 Vict. c. 61, s. 5 (1), as amended by 41 & 42 Vict. c. 19, s. 3, to make the order. The meaning of s. 5 of the Act of 1859 is that after a decree absolute for a divorce the Court has seisin of the marriage settlement, and can, without any application being made to it, do what it thinks best in the interest of the parties to the marriage or their children. In exercising that power the Court may have regard to any agreement come to between the parties, and in the present case the respondent is estopped from contending that the agreement, which has in fact been acted upon, should not be enforced. There is no authority for the proposition that an executor cannot, under such circumstances as those in the present case, carry on the proceedings for a variation of the settlement. In *Smithe* v. *Smithe* (2) it was held that the executor of a petitioner could not, as such, present a petition for an alteration of the settlements; but here the petition was presented by the petitioner himself in his lifetime, and the executor only seeks to become a party to that proceeding for the purpose of carrying into effect the agreement between the petitioner and respondent. The death of the petitioner does not tie the hands of the Court so as to prevent an inquiry into the marriage settlement, for, if there are children, their guardians may present a petition for variation of the settlement: *Ling* v. *Ling*. (3)

[They also cited *Sykes* v. *Sykes* (4); *Stanhope* v. *Stanhope*. (5)]

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(1) By 22 & 23 Vict. c. 61, s. 5, "The Court after a final decree of nullity of marriage or dissolution of marriage may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the Court shall seem fit."

By 41 & 42 Vict. c. 19, s. 3, the Court may exercise the above powers notwithstanding that there are no children of the marriage.

(2) L. R. 1 P. & M. 587.

(3) 4 Sw. & Tr. 99.

(4) L. R. 2 P. & M. 163.

(5) 11 P. D. 103.

Inderwick, Q.C., and *Priestley*, for the respondent. The provisions of s. 5 of the Act of 1859 give the Court power to deal with settled property, and must be strictly construed. The word "benefit" in that section means pecuniary benefit, and it is impossible to contend that to vary this settlement would be for the pecuniary benefit of the respondent. The clear meaning of the section (as amended by s. 3 of the Act of 1878) is that, where there are no children, the Court may make an order for the benefit of an existing party to the marriage, but that it cannot make an order to the detriment of one of the parties to the marriage unless the other party is benefited by it. The case of *Sykes* v. *Sykes* (1), as far as it goes, is an authority for the proposition that after the death of the petitioner the Court cannot make an order for variation of settlements in a way that would be detrimental to the respondent.

[They also cited *Grant* v. *Grant.* (2)]

Bayford, Q.C., in reply. The word "benefit" in s. 5 is not limited to pecuniary benefit; the section is satisfied if there be a benefit, even though indirect. The section contains no express words giving the Court power to make an order to the detriment of any one; it must, therefore, receive a workable interpretation, if it is to be of any value; and its language is wide enough to include a variation of settlements for the benefit of the estate of a deceased party to the marriage.

Cur. adv. vult.

April 23. SIR F. H. JEUNE, PRESIDENT. [After stating the facts as above, the learned judge proceeded:—] The present application is that the executor of the petitioner should be made a party to the suit for the purpose of prosecuting it and for carrying into effect the terms come to between the counsel of the petitioner and of the respondent on June 14, 1895.

This summons is not correct in point of form. The suit for dissolution of marriage was ended by the decree nisi being made absolute. An application to vary a settlement under s. 5 of the Matrimonial Causes Act, 1859 (amended by s. 3 of the Matrimonial Causes Act, 1878), is a separate proceeding under these statutes consequential on, but not part of, a suit for dissolution. The judgments of the Court of Appeal in *Stanhope* v. *Stanhope* (1), and especially that of Bowen L.J., may be referred to as authority for this view. But in substance the present application is for a variation of the marriage settlement at the instance of the representatives of the deceased husband under the statutes just mentioned. The question is, can such an application be entertained?

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(1) L. R. 2 P. & M. 163.

(2) 2 Sw. & Tr. 522.

I do not think it can be successfully contended that to vary the settlement in accordance with the terms arranged between the parties to the divorce suit, or, in other words, to reduce the wife's annuity from a considerably larger amount to 120*l.*, is for her benefit within the meaning of s. 5 of the Act of 1859. It may be that a pecuniary benefit of an indirect nature, such as this Court has considered a benefit to children in dealing with their interests, or the Chancery Division has considered a benefit to a wife in allowing her to spend settled funds, might be deemed to be a benefit within this section. But in the present case it would not be to the pecuniary advantage of the wife, directly or indirectly, that her income should be considerably reduced. The petitioners in this instance must, therefore, make out that in the term "husband" in s. 5 the representatives of the husband are included.

There is no decision, though there is a strong dictum, on the point in question. In *Ling* v. *Ling* (2) it was held that if the petitioner in a divorce suit dies after the dissolution of a marriage, an application may be made to vary the settlements for the benefit of the children of the marriage; and in *Smithe* v. *Smithe* (3) it was decided that the proper person to make such an application is not the representative of the petitioner, but the guardian of the children. These cases, therefore, do not touch the question at issue. But in *Sykes* v. *Sykes* (4) the learned judge ordinary, in deciding that an application to vary settlements cannot be made for the benefit of the father of one of the parties to the marriage, said: "The object of the section

(1) 11 P. D. 103.
(2) 4 Sw. & Tr. 99.
(3) L. R. 1 P. & M. 587.
(4) L. R. 2 P. & M. 163.

is to enable the Court to divert the money to which a wife, who is proved to have been guilty of adultery, is entitled under settlement, from her, and to apply it for the benefit of her husband and children. It is plain that, when the husband and children are dead, the power of the Court is at an end." Notwithstanding this dictum, I confess I have had considerable doubt how this question should be decided. It is quite clear that when a question of marriage status is in issue, it comes to an end with the life of either of the parties to the marriage; and the attempt made in the case of *Stanhope* v. *Stanhope* (1), where the petitioner died before decree absolute, to continue the suit and obtain a decree in order to follow it up with an application to vary the marriage settlements, was a perfectly hopeless proceeding. But after the marriage is dissolved a variation of settlements affects property only, and it is not at all inconceivable that the Legislature may, if a husband or wife dies after the dissolution of their marriage, have intended to allow an application to vary settlements to be made for the benefit of their estates. But, on the whole, I do not think that such an intention is to be gathered from the language of this section. It was the clear purpose of the enactment to limit the power of varying settlements within narrow boundaries specially defined, and the words, therefore, may well be confined within their narrowest significance, and to the term "parents" be assigned the meaning of parents personally. It was clearly part of the intention of the enactment that, in the very common case of the funds for a marriage settlement being contributed by persons other than the parties to the marriage, such persons should not be allowed, on the dissolution of the marriage, to ask, as they otherwise inevitably would, for the return of those funds. But the intention of the Legislature seems to go further than this. If, as is often, perhaps generally, the case, there is an interest in remainder, in default of issue, after the death of the parties to a marriage, the persons representing that interest are clearly prohibited from seeking to benefit at the expense of a guilty party to a dissolved marriage. If, for example, in this case there had been a remainder in favour of

(1) 11 P. D. 103.

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the relatives of the husband after his death, those persons could not have asked to have the settlement varied for their benefit. It seems to me impossible to suppose that the Legislature intended to grant to the representative of the husband what they denied to those persons whom the settlement itself named as the successors of his interest in it. It is obvious, also, that if once you let in representatives of a husband or wife to claim you may be raising questions as to conflicting rights very difficult to decide without further guidance than the section affords. For instance, the relative means of the husband and wife, and even their wishes, are material to be considered in varying settlements; but such considerations as arise in these respects are supplanted by others totally different when the representatives, or, it may be, the devisees, take the place of a party to a marriage. Certainly the difficulty of the problems that arise now, and are puzzling enough, would be intensified. Again, while it is one thing to protect from pecuniary loss those directly affected by the breaking up of a home—namely, the parents and children—it is quite another thing to allow the dissolution of a marriage to bring a pecuniary benefit to persons who suffer no loss from it. Nor is it to be forgotten that, though it is true that the duration of the interest of the guilty party fixes an extreme limit of time within which application to vary settlements can be made, still to allow a representative to claim might long postpone the application to the Court.

For these reasons I think it the safer view to hold that the Legislature intended in the Act of 1859 to limit the power of altering settlements to the personal benefit of a husband, wife, or children, and, in amending the section in 1878, some years after the decision in *Sykes* v. *Sykes* (1), abstained from giving it a wider scope. I think, therefore, the present application must be refused; but I express no opinion whether specific performance of the terms of settlement between the late husband and the wife cannot be enforced. There will be no order as to costs.

W. J. B.

The executor of the petitioner appealed.

(1) L. R. 2 P. & M. 163.

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Bayford, Q.C., *Haldane, Q.C.*, and *Bargrave Deane*, for the appeal.

[*Inderwick, Q.C.*, took the preliminary objection that this was an appeal from an interlocutory order, and that leave to appeal had not been given.

Bayford, Q.C. This order is not interlocutory. [He referred to *Stanhope* v. *Stanhope*. (1)]

THE COURT held that the hearing must proceed.]

The Divorce Act of 1857, s. 45, and 22 & 23 Vict. c. 61, s. 5, as amended by 41 & 42 Vict. c. 19, s. 3, enable the Court to make the order. The latter enactment empowers the Court to vary a settlement in the way it thinks best in the interest of the parties, and its terms are wide enough to authorize an alteration for the benefit of the estate of one of them. [*Midwinter* v. *Midwinter* (2) was referred to.] The wife is estopped by the agreement which was entered into, and proceedings to enforce it were commenced during the husband's life, and these proceedings his executor now seeks to continue. The agreement would be capable of specific performance, were it not that after the decision in *Cahill* v. *Cahill* (3) the appellant would be met by the objection that the agreement was not binding, as the marriage settlement contained a restraint on anticipation. The Court, however, under the Conveyancing Act, 1881, s. 39, has power to dispense with the restraint, and we ask it to do so.

[LINDLEY L.J. Is it for the benefit of the respondent to do so?]

The agreement was greatly for the benefit of the wife: it gave her a present income, and has been acted upon.

[LINDLEY L.J. Is not this the question, whether to dispense with the restraint is for her benefit at the time when the Court is applied to?]

Inderwick, Q.C., and *Priestley*, for the respondent, were not called upon.

LINDLEY L.J. On the marriage of the parties the husband settled a sum of 10,000*l.* upon trust for himself for life, and after his death for the respondent for life for her separate use with a restraint upon anticipation, and after the death of the survivor upon trusts for the issue of the marriage, and in default of issue for the husband. The fund has been invested so as to produce about 350*l*. a year. There has been no issue of the marriage. On June 14, 1895, the husband obtained a decree nisi for dissolution of the marriage. On the same day an agreement was come to between the husband and wife by their counsel that the husband would settle sufficient funds to secure to the wife 120*l*. a year for life, and that the wife would consent to the marriage settlement being set aside and the whole of the trust funds (subject to the settlement agreed to be made on her) transferred to the husband. On January 13, 1896, the decree was made absolute. On February 7 the husband presented a petition to vary the marriage settlement, substantially to carry out the agreement. On February 27, before anything could be done, the husband died, and his legal personal representative now seeks to have the agreement carried out.

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(1) 11 P. D. 103.

(2) [1893] P. 93.

(3) 8 App. Cas. 420.

If the wife had not been restrained from anticipation the agreement of June 14, 1895, would have been binding on her; but there are no means now of converting an agreement which was not binding on her when made, into an agreement which is binding on her. Sect. 39 of the Conveyancing Act, 1881, has no application. It enacts that, "Notwithstanding that a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order with her consent bind her interest in any property." The first difficulty is that the section gives power to the Court to free a married woman from a restraint on anticipation, and here we have not any married woman. But if she were a married woman, how could we say that it is for her benefit to make this agreement binding on her, when its effect is to give her 120*l*. a year instead of 350*l*. a year?

The applicant, therefore, is thrown back upon the Divorce Act of 1857, s. 45, and the Matrimonial Causes Act, 1859, s. 5, as amended by the Act of 1878, s. 3. How can we say that we have jurisdiction to vary the settlement under either of those enactments, there being no children of the marriage? Sect. 45 enables the Court to settle property of a guilty wife "for the benefit of the innocent party and the children of the marriage, or any or either of them." The latter enactment enables the Court to order settled property to be applied "either for the benefit of the children of the marriage or of their respective parents." Both enactments are intended only to authorize the Court to act for the benefit of living persons. The present application seeks an order only for the benefit of the estate of a deceased person, and is not within those enactments. The appeal must be dismissed.

LOPES L.J. I agree with all that Lindley L.J. has said.

RIGBY L.J. For the reasons which have been given, the 39th section of the Conveyancing Act, 1881, does not apply, s. 45 of the Act of 1857 does not apply, and s. 5 of the Act of 1859 does not apply. The decision of the President must, therefore, be affirmed.

Appeal dismissed.

Solicitors for applicant: *Rowcliffes, Rawle & Co.*
Solicitor for respondent: *Seaton F. Taylor.*

H. C. J.

THE MARIPOSA.

1896
June 24;
July 9.

Admiralty—Salvage (Life)—Authority of Master—Contract with Passengers.

The defendants' steamship, three days out from Montreal for Liverpool, stranded on the coast of Labrador. The master landed his passengers and crew, provided them with food and accommodation, and the same day intercepted a passing steamer, which, at the request of the master, conveyed the passengers to their destination.

The following day a steamer passing in the opposite direction, at the like request, took off the greater part of the crew, conveyed them to Quebec, and, on the way, telegraphed for assistance to be sent.

By the contract with the passengers the defendants were "not liable for loss or delay from the act of God . . . . perils of the seas, rivers, or navigation . . . . or the wrongful act or default" of their servants. The defendants' vessel became a total loss, materials to the value of 335*l.* only being saved.

In an action in personam by the owners of the passing steamers for salvage, or, in the alternative, for remuneration for services rendered at request, the defendants tendered 200*l.*:—

Held, by Gorell Barnes J., that the tender must be upheld, as the passengers and crew were not in any danger, so that no life salvage was claimable; and, as the defendants were under no obligation to forward the passengers to their destination, the master, in transhipping them, acted as the agent of the passengers, and not of the defendants.

ACTION IN PERSONAM for salvage, or, in the alternative, for remuneration for services rendered at request.

The plaintiffs were James and Alexander Allan, suing on behalf of themselves and others the owners of the steamships *Sardinian* and *Austrian*. The defendants were the Ocean Transport Company, Limited, the owners of the steamship *Mariposa*.

The main questions at issue were: as to the liability of the defendants to pay life salvage, and as to the extent of the authority of the master of the *Mariposa* to bind them for expenses attending the conveyance of the passengers and crew after the stranding of the vessel.

On September 24, 1895, the *Mariposa*, of 3458 tons net, and 5305 tons gross register, whilst on a voyage from Montreal to Liverpool, with cargo, twenty-eight cabin passengers, a crew of

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eighty-seven hands all told, and two stowaways, ran ashore in a fog on the coast of Labrador, about five miles west of Forteau Bay, in the Straits of Belle Isle. The passengers and crew were immediately landed, the passengers, and most of the crew, going on to, and being accommodated at, Forteau village. Another vessel of the same line was expected to pass by in a short time; but the master of the *Mariposa*, being anxious to enable the passengers to get away as early as possible, sent out a schooner to intercept the first steamer passing through the straits. The schooner on the same day fell in with the *Sardinian* —one of the Allan Line running between England and Canada —a vessel of 4405 tons gross register, from Montreal to Liverpool, with 190 passengers, cargo, and mails, a crew of 106 hands all told, and of a total value of 60,914*l*. At the request of the master of the *Mariposa* the *Sardinian* proceeded to Forteau Bay and took on board twenty-seven cabin passengers, the two stowaways, and nineteen of the crew of the *Mariposa*. The cabin passengers were provided with first-class, the others with good accommodation, and they were safely conveyed by the *Sardinian* to Liverpool, the cost of their maintenance amounting to 63*l*. 14*s*.

On September 25 the *Austrian*, another Allan liner—of 2682 tons, proceeding through the straits on a voyage from London to Montreal, with cargo, a crew of forty-seven hands, and of the total value of 39,899*l*.—saw the *Mariposa* flying signals of distress, and at the written request of the master of the *Mariposa* one cabin passenger and forty-two of her crew were taken off by the *Austrian* and conveyed to Quebec at a cost of 12*l*. 18*s*., and, on the way, at the like request, a telegram was sent from the telegraph station at Cape Magdeline by the master of the *Austrian* to the agent of the *Mariposa* at Quebec to send assistance. In consequence of this telegram assistance was sent; but it produced no result, and the master of the *Mariposa* made his own arrangements on the spot for salving all that was possible of the cargo. The rest of the crew were subsequently taken off by one of the same line of steamers, and, on October 26, the master and his officers finally left the wreck, of which materials to the value of 335*l*. only were saved.

The *Mariposa* was, at the time of the accident, running between Montreal and Liverpool as one of the Dominion line of steamers, under an agreement between the defendants and the Mississippi and Dominion Steamship Company, Limited, by which the defendants for the summer of 1895 received the freights and passage-moneys, and allowed certain commissions to the other company. The passengers' tickets were headed "The Dominion Line Royal Mail Steamships," and stated that "This ticket is good for cabin passage by the steamship *Mariposa* sailing from Quebec for Liverpool on," &c., and contained the following clause: "The company is not liable for loss or delay from the act of God, the Queen's enemies, fire, robbers, thieves (whether on board the steamer or not), perils of the seas, rivers or navigation, accident to or of machinery, boilers, or steam, or of the wrongful act, neglect or default of the company's servants (whether on board the steamer or not), restraints of princes, rulers, or people."

By their statement of claim the plaintiffs alleged that the *Sardinian* and *Austrian* incurred considerable risk in approaching close to the coast, and that the plaintiffs would have been liable for any loss arising from deviation. They further alleged that the passengers and crew of the *Mariposa* were saved from considerable hardship and exposure; that the defendants were saved the cost of maintaining them, and of carrying them to their destination; and that the plaintiffs had expended money in feeding them.

The defendants admitted that salvage remuneration was due, but alleged that the value of the property saved was only 335*l.*, and tendered and paid into court the sum of 200*l.* They denied that they were saved the cost of maintaining, or of carrying to their destination, the passengers and crew, and alleged that the master had no authority to make on their behalf any agreement express or implied.

The evidence of the master of the *Mariposa* as to the position of the passengers was in substance:—that the vessel stranded about half-past two in the morning of the third day after leaving Montreal. She lay upright within thirty or forty yards of the rocks, and the passengers with their luggage were all landed by means of a hawser. Later in the day they, and most of the crew, went on by land to the fishing village at Forteau Bay, he having been informed by a man engaged to salve the cargo that it would be better for the passengers to be there as they could be put into some good wooden houses, and be made comfortable for any length of time that they might be on shore. Provisions and stores were landed calculated to last them about a fortnight, and there were also saved about 2000 out of the 2465 sheep, and about fourteen out of the twenty head of cattle which had been shipped. The master further stated that he told his chief steward to hand their tickets back to the passengers, as he thought that the Allan Line would get the money for the passengers which the *Mariposa* would have had,—that what he did was of no benefit to his owners, but that he acted for the passengers, and made the arrangements for their comfort, and to ease his mind in the trouble he was in at the time, instead of letting them stop on the barren shore in a fishing village, as he considered his first duty was to look after the passengers and crew and get them away.

Sir Walter Phillimore and *T. E. Scrutton*, for the plaintiffs, the owners of the *Sardinian* and the *Austrian*. These two steamers, in obedience to the request for assistance, ran considerable risk in deviating from their course and rendering the services they did. The passengers were ashore in a place inaccessible by land, and they must therefore have been taken away by water. The exemptions from liability in the contract with the passengers did not relieve the master of his common law responsibility to do his best to minimise the loss: *Notara* v. *Henderson*. (1) In *The Medina* (2) the facts were of a somewhat similar character to those in this case, and the sum of 1800*l*. was awarded by way of salvage remuneration for taking pilgrims off a rock in the Red Sea and carrying them to their destination. It is true that in *The Renpor* (3), where no res was saved and only the crew were taken off, the Court held that the master had no authority to bind his owners, so that the plaintiffs failed in their salvage claim; but here the passengers were under the care of the master; and in the subsequent case of *The Alfred* (1), although no res was saved, it was held that the master, as agent ex necessitate for his owners, had authority to enter into an agreement for the other vessel to stand by, and 400*l*. was awarded for four days' towage.

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(1) L. R. 7 Q. B. 225.

(2) 1 P. D. 272; 2 P. D. 5.

(3) 8 P. D. 115.

The plaintiffs are, therefore, entitled to be paid for work and labour done, at the request of the defendants, in the carriage of the passengers and crew; and, though so far as regards the claim of the *Austrian* for salvage the tender of 200*l*. may be sufficient out of a value of 335*l*., it is no answer to the claim arising under the verbal request to the *Sardinian*, and the written request to the *Austrian*, by the master of the *Mariposa*, to take the passengers to Liverpool and the crew to Montreal. This request was within the authority of the master, and, as it was complied with, his owners are bound, though no res was saved, for the service was in the interest and for the benefit of the owners of the *Mariposa*, as passengers would not travel by these steamers if no arrangements were made for forwarding them on.

[Reference was also made to s. 190 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), as to the relief and maintenance of distressed seamen; s. 268, as to the distinction between cabin and steerage passengers; ss. 333, 334, as to the recovery of expenses incurred by governors or consuls in conveying wrecked passengers; and to s. 434, as to the right to compensation where signals of distress are used.]

Joseph Walton, Q.C., and *Alex. D. Bateson*, for the defendants. As the *Austrian* did perform some service with reference to the telegram, and about 335*l*. was saved from the ship, something may be due by way of salvage; but this is amply covered by the tender of 200*l*., the owners of the *Mariposa* not being liable for the cargo's proportion, if any, of the salvage. There is no other legal claim which the plaintiffs can successfully set up, for no life salvage is due under such circumstances as these, where no danger to life exists at the time the alleged

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(1) 5 Asp. M. L. C. 214.

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services are rendered: *Cargo ex Woosung* (1); and whatever duty was owed by the master in respect of the passengers, was owed to them as their agent ex necessitate, and not to his owners, who, under their contract with the passengers, were under no liability to convey them to their destination in another steamer. The decision in *The Renpor* (2) is conclusive on this point as regards the crew. The case of *The Alfred* (3) is not in point, for where the ship is in existence the master may make a contract to pay for standing by as the owners may thereby benefit; but here the contract, if any, was not in respect of the ship. In *The Medina* (4) the reason why the salvors were held entitled was that freight in the shape of passage-money was saved: see Kennedy on Salvage, p. 61. The defendants were not under any pressure to maintain their reputation as carriers of passengers, as this was their only ship running in the Dominion Line, and no duty was incumbent upon them to maintain the reputation of that line.

Sir Walter Phillimore, in reply.

Cur. adv. vult.

July 9. GORELL BARNES J. [After stating the facts already set out, the learned judge continued:—] The plaintiffs claim for the services rendered to the passengers and crew, either as life salvage or as being rendered by the plaintiffs for the defendants at the request of the defendants' master. They also claim salvage remuneration for taking the message to the telegraph station.

The defendants have paid into court the sum of 200*l.* to meet any claims of the plaintiffs, and it is clear that this sum is sufficient to cover any claim for sending the telegram, and for the expenses incurred, even if the latter can be recovered from the defendants, which they deny. It is, therefore, enough to satisfy all claims of the plaintiffs unless the plaintiffs are entitled to recover some reward or remuneration for the conveyance of the passengers to Liverpool and Quebec.

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(1) 3 Asp. M. L. C. 50; also in 1 P. D. 260, but not reported there on this point.

(2) 8 P. D. 115.

(3) 5 Asp. M. L. C. 214.

(4) 2 P. D. 5.

First, with regard to the claim for alleged life salvage. Ship's materials to the value of 335*l.* were saved, but the passengers and crew were in safety at Forteau Bay, and could get away without difficulty by passing steamers. They were in no danger of starvation, and were merely inconvenienced by the accident. The case of the *Cargo ex Woosung* (1) is an authority for holding that no claim for life salvage can be maintained in such circumstances.

The plaintiffs, however, contend that the passengers were carried by the *Sardinian* and *Austrian* for the defendants at their request, made by their agent, and that, therefore, the plaintiffs are entitled to reasonable remuneration for this carriage. The defendants contend that the master of the *Mariposa* had no authority from them to make any arrangements on their behalf for the carriage of the passengers. These opposing contentions raise a question of some difficulty, which I am forced to decide, as the defendants stand upon their strict rights, although the assistance rendered by the plaintiffs to the *Mariposa's* passengers was generously given in circumstances in which one shipowner may reasonably be expected to assist another and be rewarded for so doing.

The question turns upon the contract under which the passengers were being carried. [The learned judge read the clause in the contract already set out, and continued:—] It follows from this that the position in which the passengers were placed by the accident was not a matter for which the defendants could be made liable, and therefore they were not under any obligation to forward the passengers to their destination. [The learned judge then referred to the evidence already set out as to the reasons given by the master for sending on the passengers, and continued:—] I am of opinion that the master, in doing what he did, was acting for the benefit, and on account, and as the agent, of the passengers, and not of the defendants. The case of *The Medina* (2) was cited by the plaintiffs' counsel; but I have been unable to ascertain upon what terms the pilgrims were being carried, and whether the passage-money was at risk and saved by the services of the salvors. On referring to the

(1) 3 Asp. M. L. C. 50.

(2) 1 P. D. 272; 2 P. D. 5.

pleadings in that case, I find that the defendants were ready and willing to pay to the plaintiffs a reasonable amount for their services, and the point discussed before me was not raised. The observations of the Master of the Rolls in the case of *The Renpor* (1) are in favour of the view of the law which I am constrained to adopt. He says: "But there are two circumstances necessary in order to make an agreement binding on an owner: first, the contract must be made under a necessity, and secondly, it must be made for his benefit. I do not desire to say anything which may seem cruel, but I must express a doubt whether, if an agreement is made only for the purpose of saving a master and a crew without regard to any saving of the property of the shipowner, though it be in a case of necessity, yet as the subject-matter is without benefit to the property of the shipowner, the master has authority to bind the owner to a money payment."

I hold that the defendants were not liable on the contract alleged to have been made by the master, and, therefore, I must uphold the tender.

Solicitors for plaintiffs: *Pritchard & Sons.*

Solicitors for defendants: *Stokes & Stokes, for Batesons, Warr & Wimshurst, Liverpool.*

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(1) 8 P. D. 115, at p. 118.

T. L. M.

[IN THE COURT OF APPEAL.]

C. A.
1896
July 15.

THE RUTLAND.

Admiralty—Collision—Compulsory Pilotage—"Ships trading from any port in Great Britain" to port north and east of Brest—Merchant Shipping Act, 1894 (57 *&* 58 *Vict. c.* 60), *s.* 625, *sub-s.* 3.

By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 625, sub-s. 3, "Ships trading" from any port in Great Britain within the London district to any port in Europe north and east of Brest are, when not carrying passengers, exempted from compulsory pilotage in the London district.

A British ship laden with a general cargo from Rosario and La Plata for Rotterdam, with leave to carry cattle to London, discharged the cattle in London and proceeded with the cargo to Rotterdam:—

Held, by the Court of Appeal (Lord Esher M.R., Lopes and A. L. Smith L.JJ.), affirming the decision of Sir F. H. Jeune, President, that, whilst the vessel was proceeding from London to Rotterdam, she was a ship "trading" from a port in Great Britain to a port north and east of Brest, within the meaning of the statute, and was, therefore, exempt from compulsory pilotage in the London district.

Courtney v. *Cole* (19 Q. B. D. 447) approved and followed.

Appeal by plaintiffs, the owners of the *Edenbridge*, against a decision of Sir F. H. Jeune, President, finding their vessel exempt from compulsory pilotage, and therefore holding them liable for the fault of the pilot in an action of damage by collision.

On March 12, 1896, a collision occurred in the East Swin Channel between the *Edenbridge*—a screw steamship belonging to the port of London of 1657 tons net and 2593 tons gross register, with engines of 227 horse-power nominal, and a crew of 24 hands all told—and the defendants' steamship *Rutland*, of 407 tons register and 13 hands, from Hartlepool to London with coals.

The *Edenbridge* was on a voyage from Rosario and La Plata in the Argentine Republic, with a general cargo for Rotterdam, and with liberty to carry cattle and sheep for London. She had gone up the River Thames, in charge of a pilot, and on March 11 had discharged the cattle and sheep and cattlemen (employed by the shipper to look after the cattle) at Deptford, turned round, proceeded down the Thames, taken in some forty tons of bunker coal at Gravesend, and was proceeding towards Rotterdam, when the collision occurred.

The plaintiffs, the owners of the *Edenbridge*, brought an action of damage by collision against the owners of the *Rutland*, to which the latter appeared as defendants and delivered a defence, and also counter-claimed for the loss of their vessel. The plaintiffs, inter alia, replied that if the collision "was caused or contributed to by the negligence of any person on board the *Edenbridge* (which is denied) the *Edenbridge* at the time in question was in a district where pilotage is compulsory, and was in charge of a duly licensed pilot by compulsion of law, and the negligence, if any, was that of the said pilot and not of the plaintiffs or their servants."

At the trial on May 6 the parties agreed to a finding that both vessels were to blame, the fault in the navigation of the *Edenbridge* being that of the pilot alone. The question whether the *Edenbridge* was in charge of a pilot by compulsion of law was then argued, and the learned President (Sir F. H. Jeune) was of opinion that there was no material distinction between the facts of this case and those of *Courtney* v. *Cole* (1), decided under s. 379 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), and he, therefore, held that the plea of compulsory pilotage failed, as the *Edenbridge* fell within the corresponding exemption in s. 625 of the consolidating statute of 1894 relating to Merchant Shipping. (2)

On appeal:—

Sir Walter Phillimore and *F. Laing*, for the appellants (plaintiffs), the owners of the *Edenbridge*. The case of *Courtney* v. *Cole* (1) is distinguishable, because the *Cardigan-*

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(1) 19 Q. B. D. 447.

(2) 57 & 58 Vict. c. 60, s. 625: "The following ships, when not carrying passengers, shall, without prejudice to any general exemption under this part of the Act, be exempted from compulsory pilotage in the London district, and in the Trinity House outport districts; that is to say . . . .

"(3.) Ships trading from any port in Great Britain within the London district, or any of the Trinity House outport districts to the port of Brest in France, or any port in Europe north and east of Brest, or to the Channel Islands or Isle of Man."

shire was one of a line of vessels making regular voyages from ports in the East to London, where she discharged her crew and part of her cargo, and thence proceeded to Amsterdam with runners; but the *Edenbridge* is not in the habit of making the voyage upon which she was engaged at the time in question, and she only landed the cattle in London and proceeded with her cargo and crew to Rotterdam.

Secondly, if *Courtney* v. *Cole* (1) was decided on the precise words of the exemption in sub-s. 3 of s. 379 of the Merchant Shipping Act, 1854, that case may be supported without covering this case, as the material words, trading "from any port in Great Britain," do not occur in the section in the Act of 1854, and were added in sub-s. 3 of s. 625 of the Merchant Shipping Act, 1894, by incorporating these words from the Order in Council of December 21, 1871. (2) If *Courtney* v. *Cole* (1) was decided on the Act of 1854, including the Order in Council, then it is submitted that that case should be overruled, because "trading from," &c., implies a trade between London and the port in question in which the exempted vessel is engaged; but the *Cardiganshire* in *Courtney* v. *Cole* (1) was not engaged in the trade between London and Holland: she was carrying cargo from the East to Amsterdam; and the *Edenbridge* in the present case was carrying cargo from the River Plate to Rotterdam. The trade between London and Holland would not support steamers of this description, which are ocean-going vessels bringing large cargoes from distant quarters of the globe to the Continent. The whole tenor of the exemptions in the section in question points to the intention of the Legislature only to exempt small vessels constantly going to and fro between Great Britain and the North of Europe, and whose masters would be familiar with the intricacies of the navigation.

[LOPES L.J. It is material to notice that the word "constant," which occurs in the Pilotage Act of 1825 (3), is omitted from the later Acts.]

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(1) 19 Q. B. D. 447.

(2) This Order in Council is set out at p. 451 of *Courtney* v. *Cole*, 19 Q. B. D. 447.

(3) 6 Geo. 4, c. 125, s. 59. See pp. 450 and 457 of *Courtney* v. *Cole*, 19 Q. B. D. 447.

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Yes, because the word "trading" was deemed sufficient to cover the case of masters of such trading vessels being acquainted with the navigation, and so rendering the employment of pilots an unnecessary burden upon their owners.

[Reference was made to the cases of *The Sutherland* (1); *The Agricola* (2); *Mersey Docks and Harbour Board* v. *Henderson* (3); *The Winestead.* (4)]

Pyke, Q.C., and *A. E. Nelson*, for the respondents (defendants), the owners of the *Rutland*. The plaintiffs' steamship *Edenbridge* was at the time of the collision in the London district trading, without passengers, to a port in Europe north and east of Brest, and was, therefore, exempt from compulsory pilotage. It is not material that the cargo she was carrying was not loaded in London, nor is it necessary that she should be constantly or regularly trading to that part of the Continent, but only that—in the words of A. L. Smith J. in *Courtney* v. *Cole* (5)—she was "in fact trading to" such a port from the London district—that is, she was at the time engaged in that mercantile adventure. The discharge of part of the cargo and of the crew in London and the substitution of some of the same crew as runners can make no valid distinction between *Courtney* v. *Cole* (6) and the present case; nor can it be distinguished on the ground that the Order in Council of December 21, 1871, is inserted in the sub-section in question in the Act of 1894, for this constitutes the only difference between that sub-section and the corresponding sub-section in the Act of 1854, and the Order in Council was before the Court when it decided *Courtney* v. *Cole.* (5)

Sir Walter Phillimore, in reply.

LORD ESHER M.R. I think this case must be decided upon the Merchant Shipping Act, 1894, only. We cannot take into consideration the Act of 1854, which is repealed; nor can we go into the reasons of the Legislature when creating the exemptions in question, for we do not know them and cannot guess them.

(1) 12 P. D. 154.

(2) 2 Wm. Rob. 10.

(3) 13 App. Cas. 595.

(4) [1895] P. 170.

(5) 19 Q. B. D. 447, at p. 457.

(6) 19 Q. B. D. 447.

The question is, therefore, simply what is the true construction of the exemption contained in sub-s. 3 of s. 625: "ships trading from any port in Great Britain within the London district . . . . to . . . . any port in Europe north and east of Brest," &c. What does "trading" there mean? I agree with what Lopes L.J. said, that the epithet is applied to the ship—that is, to the ship in the course of her trade. What is the trade of the ship? It is the carriage of goods. The ship is exercising her trade when she is carrying goods for freight. Therefore it is a ship carrying goods for freight, sailing from any port in Great Britain to the north of Europe, which is to be exempt.

Now, does this ship come within that category? Before she comes to London she, of course, is not sailing from any port in Great Britain. But it is part of her trading adventure in this case to come into the port of London, and then it is part of her trading adventure to sail from the port of London. She is not sailing from the port of London for pleasure, or for any other purpose than for the carrying on of her trade, her trade being the carriage of goods for freight. In that way she is sailing from London to Rotterdam. Under those circumstances it seems to me that the decision of the learned judge in the Court below was correct, and that the *Edenbridge*, being within the words of the exemption, was exempted from compulsory pilotage on the occasion in question.

Lopes L.J. I am of the same opinion. So far as the area traversed by this ship is concerned, by which I mean the area between London and Rotterdam, she is exempt from compulsory pilotage if she is a ship trading within the meaning of s. 625, sub-s. 3, of the Merchant Shipping Act, 1894.

I read the section in this way: "ships trading" is the description of the ship which is to be dealt with, and then "from any port" and so on is the area which is to be covered in order to give rise to that exemption. Then it really comes to this, that the words "ships trading" or "trading ships"—I do not think there is much difference how you place the words—apply to a ship carrying cargo as contradistinguished

Lopes L.J.

from a ship not carrying cargo—as distinguished from a yacht, as distinguished from a man-of-war, and as distinguished from other craft not intended to be referred to in this section. Then is this a trading ship within the meaning of the section? She is coming from the River Plate, and she has a general cargo on board and cattle. She comes to London, and discharges the cattle in London, and then she goes to Rotterdam and delivers the rest of the cargo. Can it be said that she is not a trading ship as between London and Rotterdam? Clearly she is carrying cargo between those two ports, and therefore, within the definition I have given of a trading ship, she answers the requirements of the Act of Parliament. I cannot distinguish this case from that of *Courtney* v. *Cole*. (1) I know that case was decided on the Act of 1854, but I do not think that can make any difference. In that case, as I understand it, it was held that the word "trading" means for the time being trading, or when trading, and that it is not necessary that the ship should be constantly trading between particular ports to obtain exemption. Both on the authority of that case, and of what I consider to be the true construction of this sub-s. 3, I am of opinion that the decision of the President was correct.

A. L. SMITH L.J. I am of the same opinion. It has been pointed out over and over again that it is impossible to see why the exemptions from compulsory pilotage have been granted under the Act of 1854, and, I may add, of 1894. If you can find any reason which apparently serves as an explanation for one sub-section, you will find that the different sub-sections will oblige you to give up the reason you were trying to adopt, and I will not, therefore, try to discuss that point.

I read sub-s. 3 of s. 625 in this way: "Ships trading from any port in Great Britain," &c., means, I think, "trading ships sailing from any port in Great Britain to," &c.—that is, the word "trading" refers to the character of the ship, and so distinguishes a trading ship from a non-trader. When the sub-section is read in that way, it seems to me to become intelligible. As the *Edenbridge* was a trading ship within the

(1) 19 Q. B. D. 447.

prescribed limits, she falls within the exemption, and I, therefore, think the decision of the learned judge in the Court below was correct.

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1896

THE RUTLAND.

Appeal dismissed.

Solicitors for appellants (plaintiffs): *Botterell & Roche.*
Solicitors for respondents (defendants): *Lowless & Co.*

T. L. M.

IN THE GOODS OF CLARKE.

1896
June 29.

Practice—Presumption of Death—Evidence.

On an application for leave to depose as to the death of a person who had disappeared, the affidavit of the applicant referred to letters from that person which were not produced or accounted for, and did not explain the delay which had occurred in making the application, and there was no corroborative statement of belief of the death:—

Held, that the hearing must be adjourned for a further and better statement.

APPLICATION for leave to depose as to the death of Anthony Clarke. The applicants were two of his brothers and next of kin.

The evidence was as follows:—

The affidavit of one of the applicants stated, inter alia,—

"Anthony Clarke left England for Australia in or about the year 1865.

"In the year 1875 I wrote to him informing him of the death of our mother, and in June 1877 I received a letter from him in reply in which he stated that he should probably return home shortly. He further stated, as he had done in other letters to me, that if ever twelve months should elapse without news of him, I might know he was dead.

"Since that date I have frequently written to him, and have received no reply, and he has never communicated with me or any of my family. I have always been on affectionate terms with him, and I feel certain that, if he had been living, he would have communicated with me.

"In the year 1895 advertisements asking for information concerning him were inserted in *Lloyd's Weekly Newspaper* and the *Sydney Morning Herald.*"

An affidavit by one of the solicitors to the applicants stated that no information had been received in reply to the advertisements.

Hewitt, in support of the application.

1896

In the Goods of Clarke.

Sir F. H. Jeune, President. The case is not stated in the manner required by the practice of the Court. The affidavit of the applicant refers to letters which should have been filed or accounted for; it does not explain the delay which has occurred; and there is no corroborative statement of belief of the death. These cases seem to me often carelessly stated. In future, when the practice of the Court is not observed, I may feel compelled to order the solicitor to the applicant to pay the costs of the irregular application.

Solicitors: *Devonshire & Co.*

H. D. W.

1896

Aug. 10.

In the Goods of HUNT.

Probate—Administration with Will annexed—Administration Bond—Limited Company accepted as Sole Surety.

Where a limited company were appointed executors and trustees under a will, the Court granted administration with the will annexed to the general manager of the company as their nominee, and accepted the company themselves as sole surety under the administration bond.

William Henry Hunt, of Douglas in the Isle of Man, died having appointed the Trustees Executors and Securities Insurance Corporation, Limited, to be executors and trustees of his will. The estate was of the value of about 5000*l*.

The company having by deed-poll under their seal appointed their general manager to obtain administration of the estate with the will annexed, for their own use and benefit, applied to the registrar to accept themselves as sole surety to the administration bond. He referred the matter to the Court.

By the memorandum of association the company was declared to be established for the objects, among others, of "the undertaking and executing of the office of trustee, executor, receiver, and liquidator; and the undertaking and executing of all kinds of trusts, both public and private; and the performing and carrying out of the various kinds of business incident to and connected therewith, either gratuitously or otherwise," and "doing all such things as are incidental or conducive to the attainment of the above objects." According to the last report the liabilities of the company, apart from their share capital, were 476,108*l.*, their assets were 975,470*l.*, and they had an uncalled capital of 600,000*l.*

Bargrave Deane, for the company, admitted that in such cases it had been usual for two directors to become sureties, but submitted that the company themselves might properly be accepted as sole surety.

GORELL BARNES J. ordered that letters of administration with the will annexed should be granted to the general manager as the nominee of the company, the executors of the will, and that the company should be permitted to be sole surety for the administrator.

Solicitors: *Fishers.*

H. D. W.

IN THE GOODS OF PEARSON.

1896
July 27;
Aug. 5.

Probate—Practice—Lost Will—Proof on Motion—Necessity for Consent of Next of Kin.

The contents of a lost will cannot be proved on motion without the consent of the next of kin.

APPLICATION on the part of Mary Elizabeth Pearson, widow of Robert Pearson, for leave to prove on motion the contents of his will, which was lost. The applicant claimed to be universal legatee. The next of kin at the time of the death were the applicant and the three children of the marriage, all of whom were minors.

Bargrave Deane, for the applicant.

Cur. adv. vult.

GORELL BARNES J. The applicant, who is the widow of the deceased, and has minor children, asks to be allowed to prove on motion the contents of her husband's will, which is lost; but a difficulty has arisen as to obtaining the consent of the next of kin who are minors.

I wished, if possible, to assist the applicant, and I adjourned the case in order that the value of the property might be ascertained. Had this been very small, I might perhaps have made the grant in order to save expense; but I find that it is substantial, between 1100*l.* and 1200*l.* I must, therefore, deal with the question on principle.

I have looked through the cases on the subject, and I have made inquiries in the Registry, with the result that I cannot discover a single case in which the contents of a lost will have been allowed to be proved on motion without the consent of the next of kin, and I am informed that it has always been the practice to require their consent, and, where this is not or cannot be given, to require the will to be propounded. I must, therefore, dismiss this motion. I am sorry to do so, but I feel that, if I acted otherwise, I should set aside a fixed rule of the Court, which it is, in my judgment, most desirable to maintain. Where the amount of property dealt with by a lost will is substantial, I think that its contents should not, except with the consent of all those who are interested in the estate, be proved on affidavit only, without that opportunity for a full investigation of the facts which is afforded by an action. The motion is, therefore, dismissed.

Solicitors: *Rowcliffes, Rawle & Co.*

H. D. W.

[IN THE COURT OF APPEAL.]

C. A.
1896
July 3.

SALTER *v.* SALTER.

Probate—Practice—Jurisdiction—Lis Pendens—Receiver before Probate.

A. entered a caveat against probate of a will. B., the executor named in the will, warned it, and A. appeared. Before anything further had been done A. moved for an order for a receiver and administrator pendente lite:—

Held (affirming the decision of the President), that there was no jurisdiction to make the order, for the caveat proceedings did not constitute a lis pendens, and, as no writ had been issued, there was no application to the Court on which the Court could act.

In re Parker (54 L. J. (Ch.) 694) explained.

THIS was an appeal by the widow of the deceased, Frederick Salter, from a decision of the President.

Frederick Salter, on April 10, 1896, made a will leaving all his property to his wife Alice, and appointing John Carter executor. On May 9 he made another will revoking all former wills and giving all his property to his brother John Salter, whom he appointed sole executor. Frederick Salter died on May 26.

On May 30, 1896, the solicitor of Mrs. Salter entered a caveat in this form:—

"May 30, 1896.—A caveat in the estate of Frederick Salter, deceased, who died on or about May 26, 1896, was this day entered by H. Rose-Innes, of New Inn, Strand, solicitor."

To this a warning was issued in the following form:—

"To Hugh Rose-Innes, of 2, New Inn, Strand.—You are hereby warned within six days exclusive of Sunday after the service of this warning upon you inclusive of the day of such service to cause an appearance to be entered for you in the said principal registry to the caveat entered by you in the personal estate and effects of Frederick Salter, late of &c., who died at, &c., on or about the 26th day of May, 1896, and to set forth your client's interest, and Take Notice that in default of your so doing the said Court will proceed to do all such acts matters

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and things as shall be needful and necessary to be done in and about the premises.

“Issued at the instance of J. G. Kempster, of &c., solicitor for John Salter, of &c., the sole executor named in the last will and testament of the said deceased, dated the 9th day of May, 1896.	D. H. Owen, Registrar.”

On June 10, 1896, an appearance was entered to this warning, and before anything further had been done Mrs. Salter moved for an administrator and receiver pendente lite. The President, on June 22, refused to make an order for a receiver or administrator pendente lite, but granted an injunction restraining John Salter from dealing with the property of the deceased till after June 29.

The widow appealed.

Rose-Innes, for the appellant. The case is a clear one for appointing a receiver if there is jurisdiction to do so; but the President thought there was not, for that there was no lis pendens. The caveat and warning followed by appearance constitute a lis pendens, and if there is a lis pendens the Court can appoint a receiver: 20 & 21 Vict. c. 77, ss. 70, 71. *Moran* v. *Place* (1) is not against the view that there is a lis pendens: it only decided that caveat by a married woman and warning followed by appearance did not shew that an action consequently brought by another party in the Probate Court was instituted by her. But even if there is no lis pendens there is jurisdiction to make the order. By the Judicature Act, 1873, s. 25, sub-s. 8, a receiver may be granted whenever it is just or convenient. [*In the Goods of Moore* (2) was referred to.] In the case of *In re Parker* (3) Chitty J. says that an order may be made for a receiver though there be no lis pendens; and *In re Mallaliew* (4) shews that this case is considered an authority for appointing a receiver though there is no lis pendens.

(1) Ante, p. 214.
(2) 13 P. D. 36.
(3) 54 L. J. (Ch.) 694.
(4) 91 L. T. (Journ.) 398.

[RIGBY L.J. You are not approaching the Court in the proper way: see Order I., rr. 1, 2.]

Bargrave Deane, for the brother, was not called on.

LINDLEY L.J. We cannot accede to this application. *In re Parker* (1) has been misunderstood. In that case there was a creditors' action in the Chancery Division for the administration of the estate of a deceased person whose will had not been proved, and the plaintiff, after issuing his writ, moved for a receiver. Chitty J. never meant to say that a receiver could be appointed before a writ had issued in any action; he only said that under the Judicature Act an order for a receiver might be made in an action in the Chancery Division though there was no lis pendens in the Court of Probate. The President was right in saying that he had no jurisdiction.

LOPES L.J. I am of opinion that a receiver cannot be appointed before a writ has been issued. So as to an injunction: no order can be made till after a writ has been issued. It has been urged that caveat, warning, and appearance constitute a lis pendens; but, in my opinion, they do not. A caveat is merely notice to the registrar to do nothing without notice to the solicitor who entered it. The effect of the warning is that the caveat becomes void unless the person who entered it appears within a certain time. If the person warned appears within the time limited the caveat proceedings are at an end. If after this a writ is issued the lis pendens commences, but not till then.

RIGBY L.J. I am of the same opinion. One case where the Court of Chancery granted a receiver was where there was litigation in the Court of Probate as to the person to whom probate should be granted. The Court of Chancery interfered because there was no person who had authority to take care of the property. But in order to obtain a receiver you must approach the Court in a proper way: the intervention of the Court cannot be asked for except in a proper proceeding. Unless there is a lis pendens there is no way of approaching

(1) 54 L. J. (Ch.) 694.

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Salter v. Salter.

the Court, and I cannot consider that caveat proceedings, which, as I think, are terminated by appearance, constitute a lis pendens, or furnish any mode of approaching the Court.

Appeal dismissed.

Solicitor for appellant: *H. Rose-Innes.*
Solicitor for respondent: *J. S. Kempster.*

H. C. J.

1896
June 30.

THE BARCORE.

Admiralty—Bills of Lading—Charterparty—Inherent Vice—"Damaged" Cargo.

The master of the plaintiffs' vessel signed bills of lading for cargo as "in good order and well conditioned . . . to be delivered in the like good order and condition" subject to the usual exception as to perils of the seas, and (by incorporation of the charterparty) with the further condition that the balance of freight was payable "on right delivery of cargo less value of cargo . . . damaged . . . not covered" by the exception.

The cargo consisted of fresh cut deals, shipped, as usual at the port of loading, without regard to the weather, which at the time was wet. During the voyage part of the cargo became tainted, discoloured, and out of condition. In an action for balance of freight:—

Held, by Gorell Barnes J., that the defendants, the holders of the bills of lading, were not entitled to deduct the amount of the deterioration of the cargo from the balance of freight, as the word "damaged" referred to damage due to breach of contract by the shipowner, and did not include damage arising from want of power in the cargo to bear the ordinary transit in a ship.

Action for balance of freight.

The plaintiffs were Eyre, Evans & Co., of Liverpool, owners of the *Barcore*, and they sought to recover from the defendants, Watsons of Cardiff, 532*l*. 14*s*. 11*d*., being the balance of freight on a cargo of deals carried by the plaintiffs' vessel from St. John, New Brunswick, to Cardiff.

The defendants, as consignees of the cargo, claimed, by way of set-off and counter-claim, to deduct the sum of 135*l*. 18*s*. for alleged damage to the cargo, and paid into court the difference, namely, 396*l*. 16*s*. 11*d*.

The bills of lading, dated July 13, 1895, and indorsed to the

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THE BARCORE.

defendants, incorporated the terms and conditions of a charterparty, dated May 31, 1895, on the construction of which the question in dispute turned. It was made between G. T. Soley & Co., Limited, as agents for the plaintiffs, and W. Malcolm Mackay, the shipper of the cargo. It contained (inter alia) the following exceptions and conditions:—

"The act of God, perils of the sea, fire on board, in hulk or craft, or on shore, floods, ice, barratry of the master and crew, enemies, pirates and thieves, arrests and restraints of princes, rulers and people, collisions, stranding, and all and every other dangers and accidents of the seas, rivers and navigation at ports of loading $\frac{\text{and}}{\text{or}}$ discharge $\frac{\text{and}}{\text{or}}$ call wheresoever, of whatever nature and kind soever throughout this charter always mutually excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners or other servant of the shipowners."

"Freight payable . . . . as follows, viz.: one-third in cash on arrival, and the remaining two-thirds on right delivery of cargo, less value of cargo short delivered or damaged (if any) not covered by the preceding 'act of God' clause, in cash, with two per cent discount, all in British sterling money."

"Bills of lading to be conclusive evidence against the owners as establishing quantity delivered to ship. The captain's or agent's signature to be accepted in all cases as binding on owners."

The master of the *Barcore* had signed the bills of lading for the cargo as "shipped in good order and well-conditioned" and "to be delivered in the like good order and condition"; but it appeared from the evidence that the spruce deals of which the cargo was mainly composed were, as usual in shipments for England, in green condition, that is, fresh cut from the saw, and, as it was not the practice in the wood trade for shippers to stop loading on account of rain, and as the master was told by the shippers that fresh water did not hurt it, the cargo had been taken from craft alongside during wet weather.

In the course of the voyage part of the cargo became tainted, discoloured, and deteriorated in value to the amount claimed by the defendants.

Aspinall, Q.C., and *H. Holman*, for the defendants, began, and contended that the master of the *Barcore*, having signed for the cargo as "in good order and well conditioned," the plaintiffs, the owners of the vessel, were bound to deliver it in the like condition, subject only to the usual exception as to perils of the seas, and, as the damage was not covered by the exception, the plaintiffs were liable for the deterioration, they having in effect, by the terms of the charterparty, insured the cargo.

Joseph Walton, Q.C., and *Bailhache*, for the plaintiffs, contended that the owners of the *Barcore* had not insured or warranted the safe delivery of the cargo, for the wording of the bills of lading and charterparty must be construed with reference to the contract they contained, and the shipowner could only be made liable on proof of a breach of that contract; but the depreciation in the value of the cargo was due to damage before shipment, that is, to inherent vice arising out of the deals being fresh cut and wet.

[Reference was made to the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), s. 3, and to *Davidson* v. *Gwynne* (1), as cited in Carver on the Carriage of Goods at Sea, 2nd ed. p. 14, n. (*h*).]

GORELL BARNES J. I am of opinion that the contention of the plaintiffs is correct, and that the defendants are not entitled to deduct the sum of 135*l.* 18*s.* from the freight. In my judgment the clause in the charterparty which has given rise to the dispute was intended to enable the charterers, or holders of bills of lading, incorporating the terms and conditions of the charterparty, to deduct from the freight the value of so much of the cargo as the shipowner would be liable to pay for, if a claim were made against him for delivering the cargo in such a condition that he was committing a breach of contract in so delivering it; and it seems to me that this view is fortified by the expression in the same clause, "short delivered." That clearly contemplates a breach of contract. In my opinion the word "damaged" refers to damage through breach of contract,

(1) 12 East, 381.

and does not apply to the facts of this case. This cargo was not damaged by reason of the shipowner committing a breach of contract, or omitting to do something which he ought to have done, but it was deteriorated in condition by its own want of power to bear the ordinary transit in a ship.

For these reasons, my judgment must be for the plaintiffs for the balance of freight not paid, namely, 135*l.* 18*s.* beyond the amount paid into court, and I dismiss the counter-claim with costs.

Solicitors for plaintiffs: *Ince, Colt & Ince, for Ingledew & Sons, Cardiff.*

Solicitors for defendants: *Downing & Hancock, Cardiff.*

T. L. M.

[IN THE COURT OF APPEAL.]

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1896
July 2, 3.

THE WINSTANLEY.

Admiralty—Collision—Newport Harbour By-Laws, art. 13.

By art. 13 of the Newport Harbour By-Laws, 1894: Every vessel shall, unless prevented by stress of weather, be brought into and be taken out of the harbour to the right of mid-channel:—

Held, by the Court of Appeal (Lord Esher M.R., A. L. Smith and Rigby L.JJ.), that, in order to comply with this by-law, every vessel proceeding inward from sea must keep outside the southernmost of the buoys, marking the channel at the entrance to the River Usk, until she can round in on to her proper side between the buoys.

Appeal by defendants, the owners of the *Winstanley,* against a decision of the President finding their vessel alone to blame for a collision with the *Govino,* belonging to the plaintiffs.

The case is reported only on the construction to be placed on art. 13 of the by-laws of the Newport Harbour Commissioners prescribing the mode in which vessels are to enter and leave the harbour.

On November 4, 1895, about 8 P.M., the wind at the time being light, the weather fine, and the tide about high water,

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THE WINSTANLEY.

the *Govino*—a screw steamship of 1504 tons net register, and twenty hands, from Cardiff to Newport in water ballast—came into collision at the entrance to the River Usk with the *Winstanley*, a screw steamship of 368 tons gross and 149 tons net register and eleven hands, from Newport to Portland with coals.

The case for the *Govino* was that that vessel was off the entrance to the river, steering about E. by N., and making about nine knots an hour, when the masthead and green lights of the *Winstanley* were observed about half a mile off and about three points on the port bow; that the *Govino* kept her course, but, when it was seen that there was risk of collision, the engines were stopped and reversed; and the owners of the *Govino* charged the *Winstanley* with, inter alia, a breach of art. 16 of the Regulations for Preventing Collisions at Sea, by which, in the case of two ships under steam so crossing, it is incumbent on the vessel having the other on her starboard side to keep out of the way.

The case for the *Winstanley* was that that vessel was proceeding down the river at about eight and a half knots an hour, keeping well to her starboard side of the channel, and when near the bell buoy (which is the last and south-westernmost of the buoys marking the deep water channel) the masthead and red lights of the *Govino* were observed about a mile distant and about five points on the starboard bow; that the *Winstanley* kept her course, and, when it was seen that the *Govino* was not shaping the usual course to pass the bell buoy on her port hand, the engines of the *Winstanley* were slowed; that the *Govino* came on apparently endeavouring to take a short cut across the flats, and when she approached so as to cause risk of collision the engines of the *Winstanley* were reversed, the helm put hard-a-starboard, and three blasts of her whistle blown, but the collision occurred, the port bow of the *Govino* striking the starboard bow of their vessel; and the owners of the *Winstanley*, by their counter-claim, charged the *Govino* with, inter alia, failing to port her helm so as to pass the bell buoy on her port hand, failing to keep on her starboard side of the channel and pass the *Winstanley* port side to port side, and failing to comply with arts. 12, 13 of the by-laws for the port and harbour of Newport. (1)

1896. April 23, 28. The case was heard, and the learned President found that the *Govino* passed between 1000 to 2000 feet to the north of the bell buoy; and that the vessels came into collision on the eastern side of the channel marked by the buoys. He held the *Winstanley* alone to blame on the ground, first, that she could not justify "running into the *Govino*, which, by this time, at any rate, had got upon her proper side;" and, secondly, that she ought to have stopped sooner and allowed the *Govino* to pass her so as to comply with art. 16 of the Regulations for Preventing Collisions at Sea. On this second point the learned judge said: "Counsel for the owners of the *Winstanley* have urged that the *Winstanley* had a right to assume that the other vessel would go to the southward, would round the buoy, and would then come up along the line of the deepest water, on the east side of it, in accordance with art. 13

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(1) By-laws made February 14, 1894 (confirmed by the Board of Trade March 8, 1894), by the Newport Harbour Commissioners under the Newport (Monmouthshire) Harbour Act, 1890, and the Harbour, Docks and Piers Clauses Act, 1847.

"12. Every vessel under weigh in the harbour shall when proceeding seaward be kept to the right hand of mid-channel and when proceeding inward from sea or up the river to the right hand of mid-channel, and so that in either case such vessel shall with a port helm always be and be kept clear of any vessel proceeding in the opposite direction.

"The term 'mid-channel' applies to the deep water navigable channel.

"13. Every steam or other vessel (whether towing any other vessel or not or being towed) shall unless prevented by stress of weather be brought into the harbour to the right of mid-channel and be taken out of the harbour to the right of mid-channel."

"33. . . . . The expression 'the harbour' means the port or harbour of Newport in the county of Monmouth as defined by the Newport (Monmouthshire) Harbour Act, 1890, and includes those parts of the Bristol Channel and the Rivers Usk and Ebbw which lie between an imaginary line drawn in a S. 79° west, true direction from Goldcliff until it meets the shore of the Bristol Channel eastward of Peterstone Wentlooge Church and the bridge over the River Usk at Newbridge, and the bridge carrying the South Wales Railway of the Great Western Railway Company over the River Ebbw and the banks and shores of such parts of the said channel and rivers, and any works on such banks and shores and all streams pools creeks havens bays and inlets within those limits.

"The expression 'the river' means the parts of the River Usk within the limits of the harbour as described above."

of the Newport Harbour Rules, and they say that this rule supersedes art. 16 of the Regulations for Preventing Collisions at Sea, which applies to crossing ships.

"I am unable to assent to that proposition. Of course, I have no criticism to offer with regard to *The Harvest.* (1) It is perfectly clear—it seems to me the plainest common sense—that where you have a harbour with a defined channel, constituted as the harbour and the entrance to the River Tyne is by projecting piers, that a vessel that enters ought to enter it in a proper and reasonable way; that is to say, not to come so close round the southern pier, as was the case in *The Harvest* (1), so as to hamper a vessel coming out. It is clear, and it has been so decided, that she ought to make a wider sweep and enter the harbour in a reasonable way. But that is, of course, because the harbour is such as it is in that case.

"Here the rule may be identical, but the circumstances are altogether different. In strictness, here, there is no narrow defined channel to which the rule can apply at all times. At low water there is practically no channel at all, at any rate for ships of any size, and the buoys which have been referred to are on the dry land. At high water, again, in a certain sense, there is no defined channel, because there is a very large area of water over part of which a heavy vessel, even of very considerable draft, can at a high state of the tide pass; and it is, of course, at high water that the harbour of Newport is used.

"One cannot ascribe in that view any narrow sense to the word 'harbour,' because when one looks at the definition clause one finds that 'harbour' is not the mere entrance to the docks at Newport, but is a large area bounded by two headlands, and reaches out a very considerable distance between the two buoys. One cannot say from that that those two buoys constitute the entrance to the harbour; and the Trinity Masters and I are quite unable to see why vessels should go between those two buoys when there is sufficient depth of water for them to come up to Newport without doing so, and why it is not reasonable for them to approach substantially in the way in which this vessel was approaching.

(1) 11 P. D. 14 (on appeal) 90.

"Under those circumstances, what is there to abrogate the operation of art. 16? I think there is nothing. Art. 16, no doubt, is abrogated by circumstances such as those in a case like *The Ranger*. (1) If a vessel is seen exhibiting a light over the land, then it is known that if she follows the ordinary course of the river she will, at all material times, not be approaching in the way in which her light as seen over the land would seem to shew, but will approach a vessel coming up the river more nearly end on.

"Counsel for the *Winstanley* invoke that to shew that here a vessel seen across the flats really ought to be taken as intending to come between the buoys, because it is the duty of both vessels to go between the buoys; but when one gets rid of the notion that such a duty was incumbent upon the *Govino*, all analogy with *The Ranger* (1) ceases."

On appeal:—

Raikes, Q.C., and *Butler Aspinall*, for the appellants (defendants), the owners of the *Winstanley*. The judgment of the Court below was wrong in deciding that art. 16, known as the "crossing" rule, of the Regulations for Preventing Collisions at Sea applied, because the collision occurred within the limits of the harbour of Newport, and therefore the *Govino* was bound by art. 13 of the by-laws to keep outside and to the southward of the bell buoy, so as not to enter the channel marked by the buoys until she was so far over to the east side as to be able to round in and come up on her right side. This was decided with reference to the River Tyne in the case of *The Harvest* (2), the reason of the decision being that the vessel coming out may not be hampered by the vessel coming in; and if the *Govino* had obeyed the rule the collision would not have occurred. It can make no difference that in that case the channel was marked by projecting piers, whilst here it is possible for a vessel at high water to go over the flats to the westward of the buoys, for mid-channel in the rule clearly means the deep-water navigable channel between the buoys, and the rule is intended

(1) L. R. 4 P. C. 519.

(2) 11 P. D. 14, 90.

to prevent collisions by enabling the vessel going out to know in which part of the harbour the vessel coming in will navigate.

[Lord Esher M.R. The *Govino* may have been wrong in the way she entered the channel, but the Court below has found as a fact that the collision took place on the east side of the channel—that is, in the *Govino's* proper water.]

[Counsel then dealt with this finding, but the argument is not material for the purposes of this report.]

Aspinall, Q.C., and *J. A. Hawke* (*Lennard* with them), for the respondents (plaintiffs), the owners of the *Govino*. The case of *The Harvest* (1) has reference only to a channel like the entrance to the Tyne defined by projecting piers; but the mid-channel mentioned in the rules of the Newport Harbour Commissioners varies with the depth of water, and is not necessarily midway between the buoys.

[On the question of fact as to the collision occurring on the east side of the channel, counsel were stopped.]

Lord Esher M.R. I am of opinion that we must affirm this judgment, though, I think, hardly on the same ground on which it was decided by the learned judge in the Court below.

I have no doubt that the proper mode of entering this harbour, whether you are coming from the eastward or from the westward, is to keep outside the two buoys, which really mark the entrance to the channel, until you are able to turn your vessel so as to pass between them, and nearer to the red buoy than to the bell buoy. If the vessel is coming in from the eastward, she would not be wrong with regard to a vessel coming out if she went to the eastward of the red buoy; but if she is coming in from the eastward, she ought to keep carefully on the east side of the channel marked by the buoys; and, as I have said, if she is coming in from the westward, she ought to keep outside the buoys until she can so round in as to enter the harbour nearer to the red buoy than to the bell buoy. It follows from this that the *Govino* was coming into the harbour in a wrong way.

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There was a time, therefore, when she was on the wrong side of the channel; and if this collision had happened without any fault on the part of the *Winstanley*, I should have thought that it would have been difficult for the *Govino* to have shewn that she was not in the wrong, or, if the *Winstanley* was also in the wrong, that it was not a case of both to blame; but it seems to me that the truth of the matter is, that though she did come wrongly into the harbour, and though she ought never to have been on the wrong side, she had in fact crossed the channel at the time of the collision. Therefore, at the moment of the collision she was on her right side of the channel, according to the harbour rule, and the *Winstanley* was on her wrong side.

Now, with regard to the conduct of the *Winstanley*. She came down the river on her right side; but when she saw the *Govino*, it seems to me that she starboarded, and kept starboarding. The *Govino* was, as a fact, then going across, and if those in charge of the *Winstanley*, coming down towards her, had kept a proper look-out, they must have seen that the red light of the *Govino* was narrowing. If the *Winstanley* knew, or ought to have known, that that vessel was crossing, nothing could be more wrong for her to do than to starboard. If she had done anything with her helm she should have ported. It is said on her behalf that those in charge of her thought there was not room to port, even when she got down as low as she did. I think it is for that reason that an attempt has been made to put this collision 2000 feet inside the buoys. I cannot see anything to justify that. Three or four witnesses, all of whom were in their proper stations on board the *Govino*, say that they did hear the bell buoy, and that they saw the bell buoy. They say they passed close to it. I do not believe that they passed as close to the bell buoy as they say, but I cannot see any ground for alleging that they were 2000 feet off, except as the result of calculations made by counsel laying off her course with mathematical accuracy on paper. The *Govino* was, however, turning, and those in charge of her were not keeping any set course; they were steering in order to enter the harbour, and I am satisfied that, at the very outside, the distance from the bell buoy at which she crossed did not exceed one hundred, or more probably fifty, yards. But then the *Govino* was wrong in the way she was going in, and a vessel which does a wrong thing in regard to another must shew, if she can—and the whole burden of that lies with her—that the wrong thing did not conduce to the collision. Counsel for the *Winstanley* say that those in charge of that vessel were hampered and puzzled, so that although the *Winstanley* may have done wrong it was because she was puzzled. How did the *Govino* hamper the *Winstanley*? She was going across, and if the *Winstanley* had been handled with proper skill those in charge of her would not have been hampered. What ought they to have done? They ought to have stopped long before they did, and stopped dead, in order to let the *Govino* go by and get into her place. They did not; they starboarded. I could not for some time understand how it was that the *Govino* stopped, and, as it is said, reversed. I should have thought that the best thing she could have done would have been to go on as hard as she could, assuming that the *Winstanley* was going to do the proper thing; but the closer the *Winstanley* came to the *Govino* the more the *Winstanley* starboarded her helm. That did hamper the *Govino*, and if, at the last moment, when she saw that the *Winstanley* would persist in starboarding, she stopped in order to ease the blow, I cannot say that she did wrong. Therefore, although the *Govino* went into the harbour in the wrong way, we are advised, and I am of opinion, that she did not hamper the *Winstanley*, but that the *Winstanley* hampered her, and that the whole fault of this collision lies with the *Winstanley*.

A. L. SMITH L.J. I also think that this appeal should be dismissed. The action was brought by the owners of the *Govino* against the owners of the *Winstanley* for having run into the *Govino*, and the learned President held that the *Winstanley* was alone to blame. The point taken before him by the owners of the *Govino* appears to me to have been that the sea rules applied, and not the harbour rules. That point has not been so much pressed before us, and I do not think it could have been supported; but I wish to say a word about my view of the harbour rules. It is obvious that the meaning of them is that within the harbour a ship going out, until she gets outside, keeps on her right, or starboard, side, and a ship coming in on her starboard side, so that the two ships shall pass port to port. Now comes the question, How far down does the harbour rule apply? It seems to me that you have only to put the question to yourself and it is answered, viz., that the harbour rule extends, at any rate, to those two buoys, the bell and the red buoy. It does not matter whether it is high tide or low tide. They are placed there to denote the entrance. The rule governs the harbour navigation down to those two buoys. The meaning of a similar rule was discussed in *The Harvest* (1), and it appears clear that a vessel coming from the westward must turn in so as to get on to the east side and pass up on the east side of the harbour. Now, what did the *Govino* do? Why, she clearly broke the rule, because, whether she came 100 yards, or 200 yards, or 2000 feet to the northward of the bell buoy, she must necessarily have crossed the mid-channel, and that is exactly what this rule is intended to prevent. Then, I should have thought that although the *Winstanley* might have said, "Primâ facie, I was to blame; but you disobeyed the rule, and you are also to blame"; if the *Winstanley* could have made out that she was put into a position of difficulty and had been hampered by the *Govino* not obeying the harbour rule, both would be to blame; but we are advised by our assessors, and the learned President found on the advice of the Trinity Masters, that the *Govino* did not, by going into the harbour to the northward of the bell buoy, hamper the *Winstanley*. It is clear from the evidence, that the collision happened on the east side of mid-channel, where the *Winstanley* ought not and had no business to have been. Under these circumstances I think that it has been made out that the *Winstanley* was solely to blame.

RIGBY L.J. I am of the same opinion. The evidence is contradictory; but we cannot, upon the evidence of the pilot, come to the conclusion that the *Govino* was anything like so far within the limits of the harbour as the learned President thought; but I agree that she did wrong in coming at all to the northward of the bell buoy, and that she might very well have been the cause of the collision by reason of that mistake. If she hampered the *Winstanley* in coming down channel, and in such a way as to puzzle those in charge of the *Winstanley*, then one might come to the conclusion that she was also to blame. But we are advised that she did not really hamper the *Winstanley* at all; and, then, when we turn to the conduct of the *Winstanley*, there is no doubt that the accident was due to this: that she obstinately kept on as long as she did. She ought to have stopped, and not placed herself in the position she did by that wrong manœuvre of starboarding her helm. It seems to me that if she had stopped sooner there would have been no collision at all.

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(1) 11 P. D. 14, 90.

Appeal dismissed.

Solicitors for appellants (defendants): *Pritchard & Sons.*

Solicitors for respondents (plaintiffs): *Downing, Holman & Co., for Pinkney & Bolam, Sunderland.*

T. L. M.

ORDER IN COUNCIL.

REGULATIONS FOR PREVENTING COLLISIONS AT SEA.

In force on and after the 1st day of July, 1897.

AT THE COURT AT WINDSOR,

the 27th day of November, 1896.

PRESENT:

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS by section 418 of the Merchant Shipping Act, 1894, Her Majesty is empowered from time to time on the joint recommendation of the Admiralty and the Board of Trade by Order in Council to make regulations for preventing collisions at sea:

And whereas by section 434 of the said Act Her Majesty is empowered from time to time by Order in Council to make rules as to signals of distress:

And whereas by an Order in Council dated the eleventh day of August, 1884, and expressed to be made in pursuance of the Merchant Shipping Act Amendment Act, 1862, and on the joint recommendation of the Admiralty and the Board of Trade, Her Majesty was pleased to direct that, on and after the first day of September, 1884, the regulations contained in the schedule thereto (being Regulations for preventing Collisions at Sea and as to Signals of Distress) should be substituted for the regulations contained in the first schedule to an Order in Council made under the same Act, and on such joint recommendations as aforesaid and dated the 14th day of August, 1879:

And whereas the Admiralty and the Board of Trade have jointly recommended to Her Majesty that the Regulations for preventing Collisions at Sea contained in the schedule to the said Order in Council dated the 11th day of August, 1884, except the article numbered 10 in such regulations, should, on and after the 1st day of July, 1897, be annulled, and that the Regulations for preventing Collisions at Sea contained in Schedule I. hereto annexed should, on and after the last-mentioned date, be substituted therefor, with the exception aforesaid, and come into operation as regards British ships and boats:

And whereas it has been made to appear to Her Majesty that it is expedient that the regulations or rules as to signals of distress contained in the schedule to the said Order in Council dated the 11th day of August, 1884, should, on and after the said 1st day of July, 1897, be annulled and that the rules as to signals of distress contained in Schedule II. hereto annexed should, on and after the last-mentioned date, be substituted therefor and come into operation as regards British ships and boats:

And whereas the provisions of section 1 of the Rules Publication Act, 1893, have been complied with:

Now, therefore, Her Majesty, by virtue of the power vested in Her by section 418 of the Merchant Shipping Act, 1894, and on the joint recommendation of the Admiralty and the Board of Trade, and by and with the advice of Her Privy Council, is pleased to direct that, on and after the 1st day of July, 1897, the Regulations for preventing Collisions at Sea contained in the schedule to the said Order in Council dated the 11th day of August, 1884, except the article numbered 10 in such regulations, shall be annulled and the Regulations for preventing Collisions at Sea contained in Schedule I. hereto annexed shall be substituted therefor (with the exception aforesaid) and come into operation as regards British ships and boats:

And Her Majesty is further pleased, by virtue of the power vested in Her by section 434 of the Merchant Shipping Act, 1894, and by and with the advice of Her Privy Council, to direct that, on and after the 1st day of July, 1897, the regulations or rules as to signals of distress contained in the schedule to the said Order in Council dated the 11th day of August, 1884, shall be annulled, and the rules as to signals of distress contained in Schedule II. hereto annexed shall be substituted therefor and come into operation as regards British ships and boats.

C. L. PEEL.

SCHEDULE I.

PRELIMINARY.

These rules shall be followed by all vessels upon the high seas and in all waters connected therewith, navigable by seagoing vessels.

In the following rules every steam vessel which is under sail and not under steam is to be considered a sailing vessel, and every vessel under steam, whether under sail or not, is to be considered a steam vessel.

The words "steam vessel" shall include any vessel propelled by machinery.

A vessel is "under way," within the meaning of these rules, when she is not at anchor, or made fast to the shore or aground.

Rules concerning Lights, &c.

The word "visible" in these rules, when applied to lights, shall mean visible on a dark night with a clear atmosphere.

Art. 1. The rules concerning lights shall be complied with in all weathers from sunset to sunrise, and during such time no other lights which may be mistaken for the prescribed lights shall be exhibited.

Art. 2. A steam vessel when under way shall carry—

(*a*.) On or in front of the foremast, or if a vessel without a foremast, then in the fore part of the vessel, at a height above the hull of not less than 20 feet, and if the breadth of the vessel exceeds 20 feet, then at a height above the hull not less than such breadth, so, however, that the light need not be carried at a greater height above the hull than 40 feet, a bright white light, so constructed as to show an unbroken light over an arc of the horizon of 20 points of the compass, so fixed as to throw the light ten points on each side of the vessel, viz., from right ahead to two points abaft the beam on either side, and of such a character as to be visible at a distance of at least five miles.

(*b*.) On the starboard side a green light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible at a distance of at least two miles.

(*c*.) On the port side a red light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible at a distance of at least two miles.

(*d*.) The said green and red side-lights shall be fitted with inboard screens projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

(*e*.) A steam vessel when under way may carry an additional white light similar in construction to the light mentioned in subdivision (*a*). These two lights shall be so placed in line with the keel that one shall be at least 15 feet higher than the other, and in such a position with reference to each other that the lower light shall be forward of the upper one. The vertical distance between these lights shall be less than the horizontal distance.

Art. 3. A steam vessel when towing another vessel shall, in addition to her side-lights, carry two bright white lights in a vertical line one over the other, not less than six feet apart, and when towing more than one vessel shall carry an additional bright white light six feet above or below such lights, if the length of the tow, measuring from the stern of the towing vessel to the stern of the last vessel towed, exceeds 600 feet. Each of these lights shall be of the same construction and character, and shall be carried in the same position as the white light mentioned in Art. 2 (*a*), except the additional light, which may be carried at a height of not less than 14 feet above the hull.

Such steam vessel may carry a small white light abaft the funnel or aftermast for the vessel towed to steer by, but such light shall not be visible forward of the beam.

Art. 4. (*a*.) A vessel which from any accident is not under command shall carry at the same height as the white light mentioned in Art. 2 (*a*), where they can best be seen, and, if a steam vessel, in lieu of that light, two red lights, in a vertical line one over the other, not less than six feet apart, and of such a character as to be visible all round the horizon at a distance of at least two miles; and shall by day carry in a vertical line one over the other not less than six feet apart, where they can best be seen, two black balls or shapes each two feet in diameter.

(*b*.) A vessel employed in laying or in picking up a telegraph cable shall carry in the same position as the white light mentioned in Art. 2 (*a*), and if a steam vessel, in lieu of that light, three lights in a vertical line one over the other, not less than six feet apart. The highest and lowest of these lights shall be red, and the middle light shall be white, and they shall be of such a character as to be visible all round the horizon at a distance of at least two miles. By day she shall carry in a vertical line one over the other, not less than six feet apart, where they can best be seen, three shapes not less than two feet in diameter, of which the highest and lowest shall be globular in shape and red in colour, and the middle one diamond in shape and white.

(*c*.) The vessels referred to in this Article when not making way through the water, shall not carry the side-lights, but when making way shall carry them.

(*d.*) The lights and shapes required to be shown by this Article are to be taken by other vessels as signals that the vessel showing them is not under command and cannot therefore get out of the way.

These signals are not signals of vessels in distress and requiring assistance. Such signals are contained in Art. 31.

Art. 5. A sailing vessel under way, and any vessel being towed, shall carry the same lights as are prescribed by Art. 2 for a steam vessel under way, with the exception of the white lights mentioned therein, which they shall never carry.

Art. 6. Whenever, as in the case of small vessels under way during bad weather, the green and red side-lights cannot be fixed, these lights shall be kept at hand lighted and ready for use; and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side nor the red light on the starboard side, nor, if practicable, more than two points abaft the beam on their respective sides.

To make the use of these portable lights more certain and easy, the lanterns containing them shall each be painted outside with the colour of the light they respectively contain, and shall be provided with proper screens.

Art. 7. Steam vessels of less than 40, and vessels under oars or sails of less than 20, tons gross tonnage, respectively, and rowing boats, when under way, shall not be obliged to carry the lights mentioned in Art. 2 (*a*), (*b*), and (*c*), but if they do not carry them they shall be provided with the following lights:—

1. Steam vessels of less than 40 tons shall carry:—
   (*a.*) In the fore part of the vessel, or on or in front of the funnel, where it can best be seen, and at a height above the gunwale of not less than nine feet, a bright white light constructed and fixed as prescribed in Art. 2 (*a*), and of such a character as to be visible at a distance of at least two miles.
   (*b.*) Green and red side-lights constructed and fixed as prescribed in Art. 2 (*b*) and (*c*), and of such a character

as to be visible at a distance of at least one mile, or a combined lantern showing a green light and a red light from right ahead to two points abaft the beam on their respective sides. Such lantern shall be carried not less than three feet below the white light.

2. Small steamboats, such as are carried by sea-going vessels, may carry the white light at a less height than nine feet above the gunwale, but it shall be carried above the combined lantern, mentioned in subdivision 1 (*b*).
3. Vessels under oars or sails, of less than 20 tons, shall have ready at hand a lantern with a green glass on one side and a red glass on the other, which, on the approach of or to other vessels, shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side, nor the red light on the starboard side.
4. Rowing-boats, whether under oars or sail, shall have ready at hand a lantern showing a white light, which shall be temporarily exhibited in sufficient time to prevent collision.

The vessels referred to in this Article shall not be obliged to carry the lights prescribed by Art. 4 (*a*) and Article 11, last paragraph.

Art. 8. Pilot vessels, when engaged on their station on pilotage duty shall not show the lights required for other vessels, but shall carry a white light at the masthead, visible all round the horizon, and shall also exhibit a flare-up light or flare-up lights at short intervals, which shall never exceed 15 minutes.

On the near approach of or to other vessels they shall have their side-lights lighted, ready for use, and shall flash or show them at short intervals, to indicate the direction in which they are heading, but the green light shall not be shown on the port side, nor the red light on the starboard side.

A pilot vessel of such a class as to be obliged to go alongside of a vessel to put a pilot on board may show the white light instead of carrying it at the masthead, and may, instead of the coloured lights above mentioned, have at hand ready for use a lantern with a green glass on the one side and a red glass on the other, to be used as prescribed above.

Pilot vessels, when not engaged on their station on pilotage duty, shall carry lights similar to those of other vessels of their tonnage.

Art. 9 (1).

Art. 10. A vessel which is being overtaken by another shall show from her stern to such last-mentioned vessel a white light or a flare-up light.

The white light required to be shown by this Article may be fixed and carried in a lantern, but in such case the lantern shall be so constructed, fitted, and screened that it shall throw an unbroken light over an arc of the horizon of 12 points of the compass, viz., for six points from right aft on each side of the vessel, so as to be visible at a distance of at least one mile. Such light shall be carried as nearly as practicable on the same level as the side-lights.

Art. 11. A vessel under 150 feet in length, when at anchor, shall carry forward, where it can best be seen, but at a height not exceeding 20 feet above the hull, a white light in a lantern so constructed as to show a clear, uniform, and unbroken light visible all round the horizon at a distance of at least one mile.

A vessel of 150 feet or upwards in length, when at anchor, shall carry in the forward part of the vessel, at a height of not less than 20, and not exceeding 40, feet above the hull, one such light, and at or near the stern of the vessel, and at such a height that it shall be not less than 15 feet lower than the forward light, another such light.

The length of a vessel shall be deemed to be the length appearing in her certificate of registry.

A vessel aground in or near a fairway shall carry the above light or lights and the two red lights prescribed by Article 4 (*a*).

Art. 12. Every vessel may, if necessary in order to attract attention, in addition to the lights which she is by these Rules required to carry, show a flare-up light, or use any detonating signal that cannot be mistaken for a distress signal.

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(1) This article will deal with regulations affecting fishing-boats, and will be the subject of another Order, which will be submitted to Her Majesty for approval at a later date.

Art. 13. Nothing in these Rules shall interfere with the operation of any special rules made by the Government of any nation with respect to additional station and signal lights for two or more ships of war or for vessels sailing under convoy, or with the exhibition of recognition signals adopted by shipowners, which have been authorised by their respective Governments and duly registered and published.

Art. 14. A steam vessel proceeding under sail only, but having her funnel up, shall carry in daytime, forward, where it can best be seen, one black ball or shape 2 feet in diameter.

Sound Signals for Fog, &c.

Art. 15. All signals prescribed by this article for vessels under way shall be given—

1. By "steam vessels," on the whistle or siren.
2. By "sailing vessels and vessels towed," on the fog-horn.

The words "prolonged blast" used in this Article shall mean a blast of from four to six seconds' duration.

A steam vessel shall be provided with an efficient whistle or siren, sounded by steam, or some substitute for steam, so placed that the sound may not be intercepted by any obstruction, and with an efficient fog-horn, to be sounded by mechanical means, and also with an efficient bell. (1) A sailing vessel of 20 tons gross tonnage or upwards shall be provided with a similar fog-horn and bell.

In fog, mist, falling snow, or heavy rain-storms, whether by day or night, the signals described in this article shall be used as follows, viz.:—

(*a*.) A steam vessel having way upon her, shall sound, at intervals of not more than two minutes, a prolonged blast.

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(1) In all cases where the Rules require a bell to be used, a drum may be substituted on board Turkish vessels, or a gong where such articles are used on board small sea-going vessels.

(*b*.) A steam vessel under way, but stopped and having no way upon her, shall sound, at intervals of not more than two minutes, two prolonged blasts, with an interval of about one second between them.

(*c*.) A sailing vessel under way shall sound, at intervals of not more than one minute, when on the starboard tack one blast, when on the port tack two blasts in succession, and when with the wind abaft the beam three blasts in succession.

(*d*.) A vessel, when at anchor, shall, at intervals of not more than one minute, ring the bell rapidly for about five seconds.

(*e*.) A vessel when towing, a vessel employed in laying or in picking up a telegraph cable, and a vessel under way, which is unable to get out of the way of an approaching vessel through being not under command, or unable to manœuvre as required by these rules shall, instead of the signals prescribed in subdivisions (*a*) and (*c*) of this article, at intervals of not more than two minutes, sound three blasts in succession, viz., one prolonged blast followed by two short blasts. A vessel towed may give this signal and she shall not give any other.

Sailing vessels and boats of less than 20 tons gross tonnage shall not be obliged to give the above-mentioned signals, but if they do not, they shall make some other efficient sound signal at intervals of not more than one minute.

Speed of Ships to be Moderate in Fog, &c.

Art. 16. Every vessel shall, in a fog, mist, falling snow, or heavy rain-storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

Steering and Sailing Rules.

Preliminary—Risk of Collision.

Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist.

Art. 17. When two sailing vessels are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other, as follows, viz.:—

(*a.*) A vessel which is running free shall keep out of the way of a vessel which is close-hauled.

(*b.*) A vessel which is close-hauled on the port tack shall keep out of the way of a vessel which is close-hauled on the starboard tack.

(*c.*) When both are running free, with the wind on different sides, the vessel which has the wind on the port side shall keep out of the way of the other.

(*d.*) When both are running free, with the wind on the same side, the vessel which is to windward shall keep out of the way of the vessel which is to leeward.

(*e.*) A vessel which has the wind aft shall keep out of the way of the other vessel.

Art. 18. When two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other.

This article only applies to cases where vessels are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to two vessels which must, if both keep on their respective courses, pass clear of each other.

The only cases to which it does apply are when each of the two vessels is end on, or nearly end on, to the other; in other words, to cases in which, by day, each vessel sees the masts of the other in a line, or nearly in a line, with her own; and, by night, to cases in which each vessel is in such a position as to see both the side-lights of the other.

It does not apply, by day, to cases in which a vessel sees another ahead crossing her own course; or by night, to cases where the red light of one vessel is opposed to the red light of the other, or where the green light of one vessel is opposed to the green light of the other, or where a red light without a green light, or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead.

Art. 19. When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

Art. 20. When a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel.

Art. 21. Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed.

Note.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision. (See Arts. 27 and 29.)

Art. 22. Every vessel which is directed by these Rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other.

Art. 23. Every steam vessel which is directed by these Rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse.

Art. 24. Notwithstanding anything contained in these Rules, every vessel, overtaking any other, shall keep out of the way of the overtaken vessel.

Every vessel coming up with another vessel from any direction more than two points abaft her beam, i.e., in such a position, with reference to the vessel which she is overtaking, that at night she would be unable to see either of that vessel's side-lights, shall be deemed to be an overtaking vessel; and no subsequent alteration of the bearing between the two vessels shall make the overtaking vessel a crossing vessel within the meaning of these Rules, or relieve her of the duty of keeping clear of the overtaken vessel until she is finally past and clear.

As by day the overtaking vessel cannot always know with certainty whether she is forward of or abaft this direction from the other vessel, she should, if in doubt, assume that she is an overtaking vessel and keep out of the way.

Art. 25. In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.

Art. 26. Sailing vessels under way shall keep out of the way of sailing vessels or boats fishing with nets, or lines, or trawls. This rule shall not give to any vessel or boat engaged in fishing the right of obstructing a fairway used by vessels other than fishing vessels or boats.

Art. 27. In obeying and construing these Rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above Rules necessary in order to avoid immediate danger.

Sound Signals for Vessels in Sight of one Another.

Art. 28. The words "short blast" used in this article shall mean a blast of about one second's duration.

When vessels are in sight of one another, a steam vessel under way, in taking any course authorized or required by these Rules, shall indicate that course by the following signals on her whistle or siren, viz.:—

One short blast to mean, "I am directing my course to starboard."

Two short blasts to mean, "I am directing my course to port."

Three short blasts to mean, "My engines are going full speed astern."

No Vessel Under any Circumstances to Neglect Proper Precautions.

Art. 29. Nothing in these Rules shall exonerate any vessel, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

Reservation of Rules for Harbour and Inland Navigation.

Art. 30. Nothing in these Rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbour, river, or inland waters.

SCHEDULE II.

DISTRESS SIGNALS.

Art. 31. When a vessel is in distress and requires assistance from other vessels or from the shore, the following shall be the signals to be used or displayed by her, either together or separately, viz.:—

In the daytime—

1. A gun or other explosive signal fired at intervals of about a minute;
2. The International Code signal of distress indicated by N C;
3. The distant signal, consisting of a square flag, having either above or below it a ball or anything resembling a ball;
4. A continuous sounding with any fog-signal apparatus.

At night—

1. A gun or other explosive signal fired at intervals of about a minute;
2. Flames on the vessel (as from a burning tar-barrel, oil-barrel, &c.);
3. Rockets or shells, throwing stars of any colour or description, fired one at a time, at short intervals;
4. A continuous sounding with any fog-signal apparatus.

The Mode of Citation of the Volumes of the LAW REPORTS, commencing January 1, 1896, will be as follows :—

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[1896] 1 Ch. [1896] 2 Ch.

In the Second Series,
[1896] 1 Q. B. [1896] 2 Q. B. [1896] P.

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DIVORCE—*Alimony—Permanent Alimony—Practice—Injunction—Dissolution of Marriage—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 32.

Where, a wife having obtained a decree nisi for the dissolution of her marriage, an order had been made pursuant to s. 32 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), that the husband should secure a sum for her maintenance, and that, for that purpose, it should be referred to one of the conveyancing counsel of the Chancery Division to draw a deed, the Court granted an injunction restraining the husband, his servants and agents, from dealing with certain of his property until the execution of the deed.

Sidney v. *Sidney* (11 P. D. 11) followed.
Newton *v.* Newton - - - - 36

2. —— *Alimony pendente lite—Judicial Separation—Practice—Injunction—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 22.

DIVORCE—*continued.*

Where, in a suit by a wife for judicial separation, an order for alimony pendente lite had been made against the husband, the Court refused to restrain the husband from dealing with certain of his property.

Hyde v. *Hyde* (4 Sw. & Tr. 80) followed. Carter *v.* Carter - - - - - 35

3. —— *Co-Respondent — Leave to proceed without making a co-Respondent — Affidavit of Petitioner—Practice—Necessity for Corroboration of—Dissolution of Marriage—Matrimonial Causes Act*, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 28—*Rules of* 1865, *rr.* 4, 5.

Where, upon a motion for leave to proceed without making a co-respondent, it appeared that the affidavit of the petitioner was not corroborated, the Court ordered an adjournment in order that an affidavit in corroboration might be filed, and stated that, in future, if the affidavit of the petitioner was not corroborated, any such motion would probably be dismissed. Barber *v.* Barber 73

4. —— *Co-Respondent — Practice — Necessity for making a Person co-Respondent — Inability to Prove Adultery—Matrimonial Causes Act*, 1857 (20 *&* 21 *Vict. c.* 85), *ss.* 28, 33.

Where the relief sought by the petitioner is on the ground of adultery alleged to have been committed with a man, who is alive, and whose name and identity are known, the petitioner must make that person a co-respondent; and the Court ought not to excuse him from so doing, merely because he finds that he cannot obtain evidence which will prove his case as against that co-respondent.

So *held*, by Gorell Barnes J., with the assent of Sir F. Jeune, President. Jones *v.* Jones 165

5. —— *Co-Respondent—Practice—Substituted Service — Necessity of Affidavit by Petitioner — Rules of* 1865, *rr.* 10, 11, 12, 13.

On an application to allow substituted service of a petition on a co-respondent, there should be an affidavit by the petitioner. Williams *v.* Williams and Pocock - - - - 153

6. —— *Costs—Separation Deed—Practice—Judicial Separation—Agreement for Settlement of Suit.*

The parties to a wife's suit for judicial separation entered into an agreement for the settlement of it, which provided (inter alia) that a separation deed should be executed; that the husband should pay the wife's taxed "costs of suit"; and that the agreement might be made a rule of Court:—

Held, that the costs of and incident to the preparation and settlement of the deed were not "costs of suit" which the husband was bound to pay.

Decision of Jeune P. ([1896] P. 75) affirmed. Lancaster *v.* Lancaster - - **C. A.** 118

7. —— "*Desertion without Reasonable Cause*" — *Restitution of Conjugal Rights — Conduct of Petitioner—Matrimonial Causes Act*, 1884 (47 *&* 48 *Vict. c.* 68), *s.* 5.

By the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), s. 5, "If the respondent shall fail to comply with a decree of the Court for restitution of conjugal rights, such respondent shall thereupon be deemed to have been guilty of desertion without reasonable cause, and a suit for judicial separation may be forthwith instituted, and a sentence of judicial separation may be pronounced, although the period of two years may not have elapsed since the failure to comply with the decree for restitution of conjugal rights."

In a suit for restitution of conjugal rights brought by a second wife, it appeared that differences had arisen between her and her husband, due to her inability to agree with her stepchildren, his daughters by the former marriage, and that she had in consequence left her home, and her husband had refused to receive her back:—

Held, on consideration of the evidence, that the wife had done nothing to disentitle her to maintain a suit for desertion without reasonable cause, within the meaning of s. 5 of the Matrimonial Causes Act, 1884, as interpreted by the Court of Appeal in *Russell* v. *Russell* ([1895] P. 315), and that she was therefore entitled to a decree for restitution of conjugal rights. Oldroyd *v.* Oldroyd - - - - - 175

8. —— *Evidence—Decree in previous Suit.*

On a petition by a wife for dissolution of her marriage on the ground of adultery coupled with desertion, the decree in a previous suit in which her husband had been co-respondent was produced. This decree stated that the jury found that the respondent had been guilty of adultery with the co-respondent, and that he had been condemned in costs, but contained no finding by the jury that the co-respondent had been guilty of adultery with the respondent:—

Held, that the decree was not by itself sufficient evidence of adultery against the husband. Ruck *v.* Ruck - - - - - 152

9. —— *Evidence — Practice—Identification—Use of Photographs.*

In matrimonial cases, except under very special circumstances, the Court will not act upon identification by a photograph only. Frith *v.* Frith and Paice - - - - 74

10. —— *Maintenance—Decree against Husband—Divorced Wife—Alienation Divorce Act*, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 32—*Divorce and Matrimonial Causes Act Amendment Act*, 1866 (29 *&* 30 *Vict. c.* 32), *s.* 1—*Rules of December* 26, 1865, *rr.* 95 *to* 103.

Sums of money ordered under s. 1 of the Divorce and Matrimonial Causes Act Amendment Act, 1866, to be paid by a husband for the maintenance of his divorced wife, are a purely personal allowance, and so long as the order subsists can neither be alienated nor released.

Headnote in *Jardine* v. *Jardine* (6 P. D. 213) corrected.

The decision of the President affirmed. Watkins *v.* Watkins - - - **C. A.** 222

11. —— *Maintenance — Discretion — Dissolution of Marriage—Conduct conducing to Adultery —Verdict of Jury—Matrimonial Causes Act*, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 31.

On a petition by a husband for the dissolution of his marriage, adultery by the wife was ad-

DIVORCE—*continued.*

mitted, but the jury found that the petitioner had been guilty of "wilful neglect or misconduct conducing to the adultery" within the meaning of s. 31 of the Matrimonial Causes Act, 1857.

It appeared that the parties were domestic servants. The respondent had had an illegitimate child by the petitioner before the marriage. During their married life, between 1883 and 1894, the petitioner was abroad for long periods with his master; and the respondent meanwhile kept a lodging-house, the petitioner remitting to her regularly an adequate weekly allowance. The parties lived unhappily owing to the enforced separation. In 1894 a child was born, the result, as the respondent admitted, of the adultery imputed to her in the petition.

The Court, notwithstanding the verdict of the jury, pronounced a decree nisi for the dissolution of the marriage, but directed that it should not be made absolute until the petitioner had secured to the respondent, by a proper deed, the annual sum of 20*l.*, payable in equal monthly instalments, commencing from the date of the decree nisi, during their joint lives, dum sola et casta vixerit. Parry *v.* Parry - - - - - 37

12. —— *New Trial—Motion for—Practice—Enlargement of Time—Imposition of Terms—Divorce Suit—Supreme Court of Judicature Act,* 1890 (53 *&* 54 *Vict. c.* 44), *s.* 1—*Rules of the Supreme Court, Order* LXIV., *r.* 7.

By virtue of the Supreme Court of Judicature Act, 1890, which provides that from and after October 24, 1890, every motion for a new trial, in any cause or matter in the High Court which has been tried with a jury, shall be heard and determined by the Court of Appeal, the practice with regard to a new trial of a divorce cause is regulated (not by the practice under the Matrimonial Causes Acts but) by the practice of the Court of Appeal, and consequently rule 7 of Order LXIV. of the Rules of the Supreme Court applies, and empowers the Court to grant an enlargement of the time within which to move for a new trial of the cause, and as a condition of so doing to impose terms on the party who makes the application.

In 1892 a wife petitioned for a judicial separation on the ground of her husband's adultery. The husband by his answer denied the adultery and also alleged that, at the time of his marriage with the petitioner, she had a husband living. At the trial in January, 1895, the jury found on the evidence that the husband had committed adultery, and that at the time of the marriage the first husband was dead. A decree for judicial separation was made.

In September, 1895, the first husband (who had not been heard of since 1858) returned to England. In October, 1895, the second husband presented a petition for declaration of nullity of marriage. The wife pleaded the verdict and decree in the former suit as an estoppel. At the trial Gorell Barnes J. was satisfied of the identity of the man who had returned; but held that he could not make a decree of nullity while the verdict and decree in the first suit stood unimpeached. The second husband (with the leave of the Court of Appeal) moved in the first suit

DIVORCE—*continued.*

for an enlargement of the time within which to apply for a new trial:—

Held, that the application ought to be granted, but only on the terms of the applicant undertaking to secure the payment to the respondent during their joint lives of an allowance for her maintenance, the amount of which was fixed by the Court. Wilkins *v.* Wilkins - **C. A. 108**

13. —— *Nullity of Marriage—Duress.*

On the trial of a petition for a declaration of nullity of marriage, on the ground of duress, the following facts appeared. The petitioner, a girl of seventeen, went through the ceremony of marriage with the respondent in a church on June 5, 1889. He was a friend of her brother's She had met him only a few times, and he had never spoken to her of marriage, or professed affection for her. She stated that on the day in question her mother told her that they were going for a drive, and that they drove to the church, where they found the respondent; that she thought she was being betrothed to him, and would not have submitted even to that if she had not been so much under her mother's influence, that she did what she was told: that, on leaving the church, she threw away the ring; that she had never seen the respondent since; and that none of her family then knew what had happened except her mother, who died in 1890. A few days before, the respondent had obtained a marriage licence, falsely stating in his affidavit that the petitioner's father consented to the marriage. On June 5 he sailed for South Africa with the petitioner's brother, and on their arrival told him of the marriage. Her brother returned in 1889, but did not mention the matter to any member of his family except his mother, who told him to say nothing about it. In 1893 the petitioner went through the ceremony of marriage with another man. In the same year the respondent wrote to her father from South Africa, claiming her as his wife.

The Court, upon consideration of the evidence, found that the petitioner had never consented to marry the respondent, but had gone through the ceremony as one of betrothal, and in doing so had been to such an extent under the influence of her mother and the respondent that she was not a free agent, and granted a decree nisi of nullity. Ford *v.* Stier - - - 1

14. —— *Sequestration—Practice—Right of Sequestrators—Money held by third Person, not party to the Action—Matrimonial Causes Act,* 1857 (20 *&* 21 *Vict. c.* 85), *s.* 52.

The right of sequestrators to attach moneys, alleged to be held by third persons for the judgment debtor, but denied by them to be so held, cannot be determined upon a motion in a suit to which the third persons are not parties, unless they appear and submit to the jurisdiction of the Court.

A co-respondent in a divorce suit not having paid the damages assessed against him by the jury, a writ of sequestration was issued against his property, in pursuance of which the sequestrators applied by a motion in the suit for an order calling upon the trustees of his marriage settlement to pay into court any moneys in their

DIVORCE—*continued.*

hands belonging to him. The trustees disputed their liability to the co-respondent, and the jurisdiction of the Court to make the order:—

Held, that, as the trustees were not parties to the suit, and disputed their liability to the co-respondent, and the jurisdiction of the Court, the Court had no power to make the order on motion in the suit. CRAIG *v.* CRAIG AND HAMP - 171

15. —— *Settlements—Variation—Application by Executor of deceased Petitioner—Matrimonial Causes Act*, 1859 (22 *&* 23 *Vict. c.* 61), *s.* 5—*Matrimonial Causes Act*, 1878 (41 *&* 42 *Vict. c.* 19), *s.* 3—*Restraint on Anticipation—Conveyancing and Law of Property Act*, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 39.

Held, by the Court of Appeal, affirming the decision of the President, that the power of altering marriage settlements given to the Court by s. 5 of the Matrimonial Causes Act, 1859, and s. 3 of the Matrimonial Causes Act, 1878, is limited to such alterations as are for the personal benefit of the husband, wife or children of the marriage. Where, therefore, a petitioner dies after obtaining a decree absolute for dissolution of the marriage and after presenting a petition for variation of the marriage settlement, and there are no children of the marriage, the petition for variation abates by the death of the petitioner, and the proceedings cannot be continued by his personal representatives for the benefit of his estate.

On a decree nisi for divorce being made on the petition of the husband, terms were arranged that the petitioner should secure the respondent 120*l.* a year for life, and that she should consent to their marriage settlement being annulled:—

Held, by the Court of Appeal, that, as the respondent was by the marriage settlement restrained from anticipation, this agreement was not binding on her, and that the objection could not be remedied under the power given to the Court by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 39. THOMSON *v.* THOMSON - - - - **C. A. 263**

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—— **rr. 95–103** - - - - 222
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ECCLESIASTICAL LAW — *Faculty — Chancel Screen—Confirmatory Faculty for Retention on Chancel Screen of Carved Figures representing Our Lord on the Cross, the Virgin Mary, and St. John—Representation of Historical Scene not likely to be Object of Superstitious Reverence.*

A figure of Our Lord upon the Cross was in 1880 placed in a parish church above, and on the centre of the screen separating the chancel from the nave; and in 1893 there were placed on one side thereof a figure of the Virgin Mary, and on the other side thereof a figure of St. John. All the figures were carved in wood, were about 2 ft. 9 in. in height, the central figure being rather higher than the two others, and all had been placed in the church without the sanction of a faculty. There was not in the church anything of the nature of a rood-loft or rood-stairs, and no candles were round or in front of the figures. In 1896 the rector and churchwarden of the parish instituted a cause of faculty praying the Ordinary to authorize by faculty the retention of the three figures on the screen, and filed affidavits stating that the services of the church had been conducted in accordance with the directions of the Book of Common Prayer, and that there was not and had not been anything in the said services or in the attitude of those attending the services to indicate or suggest any probability of worship, adoration, or any superstitious reverence being paid to the figures on the screen. No person appeared to oppose the grant of the faculty.

The Chancellor of the Diocese of Norwich ordered the faculty to issue as prayed. RECTOR, &C., OF BARSHAM, SUFFOLK *v.* PARISHIONERS, &C., OF THE SAME - - - - - 256

2. —— *Faculty—Pathway—Exclusive Right to Use across closed Churchyard—Construction of Faculty—Refusal to grant subsequent Faculty derogating from previous Grant—Ecclesiastical Leasing Acts*, 1842 *and* 1858 (5 *&* 6 *Vict. c.* 108; 21 *&* 22 *Vict. c.* 57)—*Practice—Refusal of Appellate Court to interfere with Discretion of Ordinary.*

In 1891 a faculty issued from the registry of the Consistory Court of London authorizing the rector and churchwardens of a parish in the City of London, in conjunction with a company owning premises abutting on the churchyard of the parish—a churchyard closed for burials under Order in Council—to make a pathway inclosed on the sides by railings, across the churchyard from the company's premises to a public thoroughfare on the opposite side of the churchyard, provided a specified rent was paid to the rector and his successors during a term of years.

The faculty recited an agreement between the rector and churchwardens and the company whereby the former agreed to concur in granting to the company a right of way over the pathway afterwards authorized by the faculty for the term, and on payment of the rent there mentioned: all the works to be done at the company's costs, and "such right of footway to be for themselves their tenants and any others authorized by them in common with the rector and churchwardens and any others authorized by the rector and churchwardens."

In 1892, after the company had done and paid for the works and whilst the term of years was still unexpired, the rector and churchwardens agreed with other owners of premises abutting on the churchyard adjacent to the company's premises to concur in granting to such owners a right of footway over the pathway made under the faculty of 1891, subject to the rights of the company, and also over a new footpath to be

ECCLESIASTICAL LAW—*continued.*

made over a piece of the churchyard to join the footpath so already made, and petitioned the Consistory Court of London for a faculty to make the new footpath and to remove a portion of the above-mentioned railings; the owners of the premises desiring the right of way over the two footpaths intervening in support of the petition:—

Held, by the Consistory Court of London, that the faculty asked for must be refused, as the faculty of 1891 had granted to the company and their assigns the enjoyment for a term of years not yet expired of the pathway made under that faculty to the exclusion of the other occupiers of premises abutting on the churchyard, and the Ordinary ought not to sanction by faculty anything being done in derogation of the exclusive right so granted:—

Held, further, by the same Court, that the operation of the Ecclesiastical Leasing Acts of 1842 and 1858 is confined to glebe lands and property of that description, and does not extend to enable the incumbent of a parish, with the consent of the patron of the living and the Ecclesiastical Commissioners, to grant leases of or rights over all or any portion of the churchyard of the parish:—

Held, on appeal by the Arches Court of Canterbury, that the construction put on that faculty by the Court below was correct, and, the grant or refusal of the faculty prayed being in the discretion of the Ordinary, by whom that discretion had been properly exercised, the appellate Court ought not to interfere, and the appeal must be dismissed.

Observations by the Chancellor of the diocese of London as to the practice of the Consistory Court of London on the grant of faculties for the formation and use of private pathways across churchyards closed for burials, and as to the provisoes to be inserted in such faculties. Rector and Churchwardens of St. Gabriel, Fenchurch Street *v.* City of London Real Property Company - - - - - - 95

3. —— *Jurisdiction—Repair of Chancel—Criminal Suit promoted by Churchwardens against Lay Rector to compel Repair of Chancel—Monition.*

The articles in a criminal suit promoted by the churchwardens of a parish against the lay rector of a parish church, charged that the chancel of the church was in a very dilapidated condition, and that the respondent, though legally bound to repair it, had for four years refused and neglected to do so. On the respondent giving an affirmative issue to the articles and submitting to judgment, the Ordinary pronounced that the respondent had offended against the ecclesiastical law, and admonished him to do the repairs required. Morley *v.* Leacroft - - 92

4. —— *Jurisdiction — Sequestration — Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 52—*Inability of Ordinary to relax Sequestration where Bankruptcy of Incumbent of sequestered Living Discharged—Sequestration Act*, 1871 (34 & 35 *Vict. c.* 45), *ss.* 1–4.

The Ordinary has no jurisdiction to relax the sequestration of the benefice of a bankrupt clergyman if the debts provable in the bankruptcy are unpaid, although the bankrupt has obtained his order of discharge.

ECCLESIASTICAL LAW—*continued.*

The 52nd section of the Bankruptcy Act, 1883, provides that "where a bankrupt is a beneficed clergyman the trustee may apply for a sequestration of the profits of the benefice, and the certificate of the appointment of the trustee shall be sufficient authority for the granting of sequestration without any writ or other proceeding, and the same shall accordingly be issued as on a writ of levari facias founded on a judgment against the bankrupt."

The incumbent of a benefice having been adjudged a bankrupt, a sequestration of the profits of the benefice was granted under the above section by the bishop of the diocese, who appointed a sequestrator of the benefice, and (after the sequestration had been in force for more than six months) a stipendiary curate to serve the cure, assigning to the latter a yearly stipend. Subsequently an order was made in the bankruptcy discharging the bankrupt, and he applied by petition to the Consistory Court of the diocese praying the Court to relax the sequestration, to direct the discharge of the sequestrator, and to revoke the appointment of the stipendiary curate. The trustee in the bankruptcy opposed the application, and objected that the debts provable in the bankruptcy still remained in part unsatisfied:—

Held, by the Chancellor of the Diocese of Winchester, that so much of the application as asked for the relaxation of the sequestration and the discharge of the sequestrator must be refused, as the Ecclesiastical Court had no jurisdiction to determine the question whether the discharge of the bankrupt acted as a satisfaction of the sequestration:

Held, also, by the same judge, that the remainder of the application ought to be referred to the bishop to be dealt with in his discretion. *In re* Lawrence - - - - 244

5. —— *Jurisdiction—Simony—False Declaration under Clerical Subscription Act*, 1865 (28 & 29 *Vict. c.* 122)—*Meaning of "Offence against Morality not being a question of Doctrine or Ritual"—Clergy Discipline Act*, 1892 (55 & 56 *Vict. c.* 32), *ss.* 2, 12—*Clergy Discipline Act*, 1892, *Procedure Rules, r.* 34.

The 2nd section of the Clergy Discipline Act, 1892, provides, inter alia, that if a clergyman is alleged to have been guilty of any immoral act, immoral conduct, or immoral habit, or of any offence against the laws ecclesiastical, being an offence against morality and not being a question of doctrine or ritual, he may be prosecuted by any person approved by the bishop, and tried in the Consistory Court of the diocese in which he holds preferment; and by the 34th rule of the Procedure Rules made under the Act, a clergyman holding no preferment may be prosecuted under the Act in the Consistory Court of the diocese in which he resides.

The complaint in a criminal suit lodged in the registry of the Consistory Court of London at the instance of a person approved by the bishop, charged the defendant, a clergyman resident in the diocese, with having been guilty of

ECCLESIASTICAL LAW—*continued.*
offences against the laws ecclesiastical, being offences against morality and not being a question of doctrine or ritual, by having within the five years last past, and within the diocese, been guilty of simony, and knowingly made a false declaration against simony under the Clerical Subscription Act, 1865. The defendant brought in an answer denying that the offences alleged in the complaint were offences against the laws ecclesiastical, being offences against morality within the meaning of the 2nd section of the Clergy Discipline Act, 1892, and at the hearing of the issues of law raised on the pleadings, contended that the Consistory Court of London had no jurisdiction to entertain the suit:—

Held, by the Ordinary, that the Consistory Court of London had jurisdiction in the suit under the Clergy Discipline Act, 1892. LEE *v.* FLACK - - - - - - - 138

"ENGAGEMENT" CLAUSE—Time—Commencement of risk - - - 237
See INSURANCE, MARINE. 2.

EVIDENCE—Decree in previous suit - 152
See DIVORCE. 8.

—— Photographs, Use of — Identification — Practice - - - - - 74
See DIVORCE. 9.

—— Presumption of death—Practice **8, 151, 287**
See PROBATE. 13—15.

EXECUTOR—Disappearance of executor to whom power to prove reserved - - 129
See PROBATE. 3.

FACULTY—Exclusive right to use of pathway across closed churchyard - - 95
See ECCLESIASTICAL LAW. 2.

—— Representation of historical scene not object of superstitious reverence - - 256
See ECCLESIASTICAL LAW. 1.

FOREIGN DOMICIL—Administration with will annexed - - - - 209
See PROBATE. 6.

FOREIGN WILL — German law — Probate of copy - - - - - - 148
See PROBATE. 5.

—— Incorporation with English will - 65
See PROBATE. 12.

FREIGHT—Commencement of risk—Time of engagement of goods - - 237
See INSURANCE, MARINE. 2.

GRANT—To executor of widow who had not taken administration - - 159
See PROBATE. 8.

HUSBAND AND WIFE—*Appeals — Practice — Summary Jurisdiction* (*Married Women*) *Act*, 1895 (58 *&* 59 *Vict. c.* 39), *s.* 11—*Order* LIX., *rr.* 4A, 7, 8, 10, 11, 12, 16.

Upon an appeal to the Probate, Divorce and Admiralty Division from the decision of a court of summary jurisdiction under the Summary Jurisdiction (Married Women) Act, 1895, the practice under the Divorce Acts has no application, and it is not necessary that any case should be stated or filed. The practice on such appeals is governed by Order LIX., rr. 4A, 7, 8, 10, 11, 12, and 16. SWOFFER *v.* SWOFFER - 131

2. —— *Cruelty, Persistent—Summary Jurisdiction* (*Married Women*) *Act*, 1895 (58 *&* 59 *Vict. c.* 39), *s.* 4—*Retrospective operation of Section.*

The provision of s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, giving jurisdiction under the Act to a court of summary jurisdiction in cases where a husband has been guilty of persistent cruelty to his wife, thereby causing her to live apart from him, is retrospective in its operation, and applies to acts of cruelty committed before the Act came into force. LANE *v.* LANE - - - - - - 133

3. —— *Desertion—Limitation of Time for Proceedings — Summary Jurisdiction* (*Married Women*) *Act*, 1895 (58 *&* 59 *Vict. c.* 39), *s.* 4—11 *&* 12 *Vict. c.* 43, *s.* 11.

For the purpose of proceedings under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, the desertion of a married woman by her husband is a continuing act; an application by the wife for an order under that section need not, therefore, be made within six months of the commencement of the desertion. HEARD *v.* HEARD 188

4. —— *Maintenance—Jurisdiction of Justices —Persistent Cruelty causing Wife to live separately —Wilful Neglect to provide reasonable Maintenance causing Wife to live separately—Limit of Time for Proceeding — Summary Jurisdiction* (*Married Women*) *Act*, 1895 (58 *&* 59 *Vict. c.* 39), *ss.* 4, 8—*Summary Jurisdiction Act*, 1848 (11 *&* 12 *Vict. c.* 43), *s.* 11.

By the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 4, "Any married woman . . . . whose husband shall have been guilty of persistent cruelty to her, or wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain, and shall by such cruelty or neglect have caused her to leave and live separately and apart from him, may apply to any court of summary jurisdiction . . . . for an order or orders under this Act."

By s. 8, "All applications under this Act shall be made in accordance with the Summary Jurisdiction Acts."

By the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11, "In all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made, and such information shall be laid, within six calendar months from the time when the matter of such complaint or information respectively arose."

Persistent cruelty by a husband to a wife, and wilful neglect by him to provide reasonable maintenance for her, in consequence of which he causes her to leave and live separately and apart from him, within the meaning of s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, are not continuing offences. The limit of

HUSBAND AND WIFE—*continued.*

time imposed by the reference in s. 8 to s. 11 of the Summary Jurisdiction Act, 1848, applies, and the complaint must in each case be made within six calendar months of the offence. Ellis *v.* Ellis - - - - - - - 251

5. —— *Maintenance—Neglect to provide—Evidence of Means—Summary Jurisdiction (Married Women) Act,* 1895 (58 *&* 59 *Vict. c.* 39), *s.* 4—*Appeal—Costs of Wife when unsuccessful Respondent.*

Upon the hearing by a court of summary jurisdiction of a summons taken out by a married woman under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, charging her husband with wilful neglect to provide reasonable maintenance for her, the Court, before making an order, must be satisfied that the husband either is in receipt of actual earnings or has the capability of earning a livelihood; evidence of means cannot be entirely dispensed with.

Where a married woman is an unsuccessful respondent in an appeal to the Probate, Divorce and Admiralty Division under the Summary Jurisdiction (Married Women) Act, 1895, the Court, without laying down any binding rule of practice, will in ordinary cases follow the practice in matrimonial causes, and order her costs of the appeal to be paid by the husband. Earnshaw *v.* Earnshaw - - - - - - 160

IDENTIFICATION—Use of photographs—Evidence—Practice - - - 74
See Divorce. 9.

INCORPORATION OF INDEPENDENT WILLS—English and foreign—Practice 65
See Probate. 12.

INJUNCTION—Judicial separation—Practice—Alimony pendente lite—Injunction to restrain husband from dealing with property - - - - 35
See Divorce. 2.

INSURANCE, MARINE—*Abandonment—Cash Advances for Ship's Disbursements—Prepaid Freight—Rights of Underwriter on Ship.*

The plaintiffs were insurers of the hull and machinery of the defendants' steamship whilst on a voyage from Pensacola to West Hartlepool. The vessel stranded at the entrance to the latter harbour, and was abandoned by the defendants to the plaintiffs as a constructive total loss, but the cargo of timber was subsequently delivered.

At Pensacola the sum of 1677*l.* 19*s.* 10*d.* had been advanced to the master by the charterers, under a clause in the charterparty, by which "Sufficient cash for ship's ordinary disbursements at port of loading to be advanced the master by the charterers or their agents at the (agreed) exchange, ship paying 2½ per cent. commission, including insurance. Master to give his draft, on owners or consignees, as required and customary to cover same, which shall be paid out of the first freight collected."

The defendants accepted from the consignees of the cargo, who held the master's draft for value, the freight less the above sum; but the plaintiffs claimed the gross freight as a benefit incident to the ship:—

Held, by the Court of Appeal (Lord Esher M.R., Lopes and Kay L.JJ.), affirming the decision of Bruce J. ([1895] P. 293), that the defendants, in accounting to the plaintiffs for the freight, were entitled to deduct the sum of 1677*l.* 19*s.* 10*d.*, as, by the terms of the charterparty, the cash advanced at Pensacola was equivalent to prepaid freight, and, as such, did not pass to the plaintiffs on the abandonment of the vessel and subsequent delivery of the cargo. The Red Sea **C. A. 20**

2. —— *Freight—Commencement of Risk—Time of Engagement of Goods—Loading Port.*

By a policy on freight "at and from any port or ports of loading on the west coast of South America to any port or ports of discharge in the United Kingdom" the freight was to be covered "from the time of the engagement of the goods."

Goods were engaged for the vessel which was to earn the freight, and were ready for shipment in her at the time of her loss, which occurred before she arrived at her first loading port on the west coast of South America:—

Held, by the Court of Appeal (Lord Esher M.R., Kay and A. L. Smith L.JJ.), affirming the decision of Gorell Barnes J. ([1896] P. 154), that the "engagement" clause must be construed with reference to the voyage described in the policy, and, therefore, as the vessel had not arrived at her first loading port on the west coast of South America, the risk had not attached. The Copernicus - - - **C. A. 237**

JOINDER—Pilot as defendant—Action in rem
See Ship. 8. 84

JOINDER OF PARTIES—Salvage Actions—Practice - - - - 233
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JUDICIAL SEPARATION—Separation deed—Costs - - - - 118
See Divorce. 6.

JURISDICTION—Consistory Court of London—Clergy Discipline Act - - 138
See Ecclesiastical Law. 5.

—— Of Ordinary to relax sequestration where bankruptcy of incumbent discharged
See Ecclesiastical Law. 4. 244

—— Receiver before probate—Caveat proceedings - - - - - 291
See Probate. 11.

—— Summary—Maintenance—Limit of time for proceeding - - - - 251
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JUSTICES—Jurisdiction—Maintenance—Limit of time for proceeding - - 251
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LIEN—Solicitor's—Charging order—Assignment of sum recovered - - - 77
See Ship. 9.

LIFE SALVAGE—Authority of master—Contract with passengers - - - 273
See Ship. 12.

LIS PENDENS—Caveat proceedings—Receiver before probate - - - 291
See PROBATE. 11.

LOST WILL—Proof on motion—Consent of next of kin - - - - 289
See PROBATE. 9.

MAINTENANCE—Divorced wife - 37, 222
See DIVORCE. 10, 11.

—— Limit of time for proceeding - - 251
See HUSBAND AND WIFE. 4.

—— Neglect to provide—Evidence of means
See HUSBAND AND WIFE. 5. 160

MARRIAGE—*Validity—Solemnization by Clergyman of the Established Church on board a British Warship without Licence or Banns—Subsequent Adultery—Dissolution of Marriage.*

A marriage between British subjects, solemnized on board an English man-of-war at a foreign station by a clergyman of the Established Church without licence or banns, is valid.

The petitioner, an officer in Her Majesty's army, was married in 1884 to the respondent, also a British subject, on board one of Her Majesty's ships, then lying at Limasol, in Cyprus, where the petitioner was stationed. The ceremony was performed by the chaplain of the vessel, a clergyman of the Established Church. There had been no publication of banns, and no licence had been obtained:—

Held, that there had been a valid marriage according to the common law of this country, and that, upon proof of the respondent's adultery, the petitioner was entitled to a decree nisi for dissolution of the marriage. CULLING *v.* CULLING AND NICHOLSON - - - - 116

MARRIED WOMAN.
See HUSBAND AND WIFE.

—— Costs of litigation of - - - 214
See PROBATE. 4.

MERSEY DOCKS—Wreck—Expenses of raising
See SHIP. 5. 192

MONITION—Criminal suit to compel repair of chancel - - - - 92
See ECCLESIASTICAL LAW. 3.

NEGLIGENCE—Damage of cargo—Bill of lading incorporating the Harter Act (Act of Congress, Feb. 13, 1893)—Negligence in "management" of the vessel in port of discharge - - - 10
See SHIP. 6.

NEW TRIAL—Enlargement of time—Imposition of terms - - - - 108
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NEWPORT HARBOUR BY-LAWS, art. 13—Collision - - - - 297
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NULLITY OF MARRIAGE—Duress - 1
See DIVORCE. 13.

ORDINARY—Jurisdiction of—Sequestration 244
See ECCLESIASTICAL LAW. 4.

PARTIES—Joinder of pilot as defendant—Action in rem - - - 84
See SHIP. 8.

—— Joinder of plaintiffs—Separate causes of action—Salvage actions - - 233
See SHIP. 7.

PHOTOGRAPHS—Use of—Identification—Evidence - - - - 74
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PRACTICE—Admiralty practice.
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—— Divorce—Conduct conducing to adultery—Verdict of jury—Discretion - 37
See DIVORCE. 11.

—— Divorce—Permanent alimony—Injunction to restrain husband from dealing with property - - - - 36
See DIVORCE. 1.

—— Judicial separation—Alimony pendente lite—Injunction to restrain husband from dealing with property - - 35
See DIVORCE. 2.

—— Probate—Necessity for lodging documents in registry - - - - 9
See PROBATE. 10.

PRESUMPTION—Of death—Advertisements—Necessity for - - - 8
See PROBATE. 15.

—— Death—Practice - - 8, 151, 287
See PROBATE. 13—15.

PROBATE—*Administration Bond—Estate partly administered—Amount of Bond.*

Where, after an estate had been partly administered, application was made for a grant of administration, the Court allowed a bond to be given in double the amount of the unadministered estate. IN THE GOODS OF OAKEY - - 7

2. —— *Administration Bond—Limited Company accepted as Sole Surety—Administration with Will annexed.*

Where a limited company were appointed executors and trustees under a will, the Court granted administration with the will annexed to the general manager of the company as their nominee, and accepted the company themselves as sole surety under the administration bond. IN THE GOODS OF HUNT - - - 288

3. —— *Chain of Executorship—Executor of Executor—Disappearance of Executor to whom Power to Prove reserved—Citation by Advertisement.*

Probate of a will was granted to one of two executors, power being reserved to make the like grant to the other executor. The acting executor died, not having fully administered; at the date of his death the other executor had not been heard of for fourteen years. The daughter and sole next of kin of the testator, with the assent of the executors of the acting executor, moved for a grant to herself of letters of administration de bonis non:—

Held, that the grant could not be made, as, upon the non-appearance to a citation of the executor to whom power to prove had been reserved, the chain of executorship would be continued in the executors of the acting executor without any

PROBATE—*continued.*

fresh grant from the Court. Leave given to effect service of the citation on the absent executor by advertisement.

In the Goods of Noddings (2 Sw. & Tr. 15, as amended by the corrigenda in that volume) followed. In the Goods of Reid - - 129

4. —— *Costs — Practice — Married Woman, Proceeding instituted by—Costs of Litigation—Entry of Caveat—Property subject to Restraint on Anticipation — Married Women's Property Act,* 1893 (56 & 57 *Vict. c.* 63), *s.* 2—*Judicature Act,* 1873 (36 & 37 *Vict. c.* 66), *s.* 100—*Rules of Supreme Court,* 1883, *Order I., r.* 1; *Order II., r.* 1.

An executor's probate action, brought in consequence of a caveat entered by a married woman who was made defendant to the action, resulted in a verdict for the plaintiff with costs against the defendant. Upon an application by the plaintiff under the Married Women's Property Act, 1893, s. 2, for an order for payment of the costs out of property to which the defendant was entitled subject to a restraint on anticipation :—

Held, by the Court of Appeal, affirming the decision of Gorell Barnes J., that the proceedings in the probate action were "instituted" within the meaning of the Act of 1893 by the issue of the writ by the plaintiff, and not by the entry of the caveat, or the appearance of the caveator in answer to the warning; and accordingly that the order applied for could not be made.

Coplestone v. *Nicholes* (33 L. J. (P. & M.) 57) and *Peacock* v. *Lowe* (L. R. 1 P. & M. 311) commented on. Moran *v.* Place - **C. A.** 214

5. —— *Foreign Will—German Law—Probate of Copy.*

The will of a German subject domiciled in the kingdom of Wurtemberg at his death had been proved in Wurtemberg in accordance with the requirements of local law and deposited with a notary, who by the law of the country was forbidden to allow it to leave his custody. It contained a direction that during her lifetime the widow should have the unrestricted right of administration and usufruct of the testator's estate without giving security, which according to the local law was equivalent to appointing her executrix, and entitled her to collect the personal estate as though she were the owner thereof. Part of the personal estate was in England :—

Held, that probate might be granted to the widow of a copy of the original will properly proved, limited to such time as might elapse before the original will itself should be brought in.

Principle in *In the Goods of Briesemann* ([1894] P. 260) applied.

In the Goods of Lemme ([1892] P. 89) followed. In the Goods of Von Linden - - 148

6. —— *Grant of Administration—Administration with Will annexed—Foreign Domicil of Testatrix — Will made in Execution of Power of Appointment.*

A testatrix who at the time of her death had a French domicil, executed, in pursuance of a power of appointment, a will in the English form invalid according to French law.

The Court, on the authority of the decision of Sir C. Cresswell in *In the Goods of Alexander* (29 L. J. (P. & M.) 93), which is held to be binding, though erroneous, following in this respect the decision of Sir J. P. Wilde in *In the Goods of Hallyburton* (L. R. 1 P. & D. 90), granted administration with the will annexed. In the Goods of Huber - - - 209

7. —— *Grant of Administration—Grant to Creditor—Notice to Next of Kin in lieu of Citation—Court of Probate Act,* 1857 (20 & 21 *Vict. c.* 77), *s.* 73.

In granting administration of a small estate to a creditor, the Court dispensed with the citation of the next of kin, on proof that they had received notice of the application. In the Goods of Teece - - - - - 6

8. —— *Grant of Administration—Intestate's Estate of Value under* 500*l.—Grant to Executor of Widow who had not taken Administration—Intestates' Estates Act,* 1890 (53 & 54 *Vict. c.* 29), *s.* 1—*Court of Probate Act,* 1857 (20 & 21 *Vict. c.* 77), *s.* 73.

A widow died without taking administration to her husband's estate, which was of the net value of under 500*l.*, and, as he died without issue, belonged exclusively to her, under s. 1 of the Intestates' Estates Act, 1890. The Court granted administration to her executor, under s. 73 of the Court of Probate Act, 1857. In the Goods of Bryant - - - - 159

9. —— *Practice—Lost Will—Proof on Motion —Necessity for Consent of Next of Kin.*

The contents of a lost will cannot be proved on motion without the consent of the next of kin. In the Goods of Pearson - - - 289

10. —— *Practice—Necessity for lodging Documents in Registry.*

The Court refused to hear a motion for the revocation of a grant of probate, and a declaration of the validity of a draft will, where the probate and draft had not been lodged in the registry. In the Goods of Riley - - 9

11. —— *Practice—Receiver before Probate—Jurisdiction—Lis Pendens.*

A. entered a caveat against probate of a will. B., the executor named in the will, warned it, and A. appeared. Before anything further had been done A. moved for an order for a receiver and administrator pendente lite :—

Held (affirming the decision of the President), that there was no jurisdiction to make the order, for the caveat proceedings did not constitute a lis pendens, and, as no writ had been issued, there was no application to the Court on which the Court could act.

In re Parker (54 L. J. (Ch.) 694) explained. Salter *v.* Salter - - - **C. A.** 291

12. —— *Practice—Two Wills, one dealing with English, the other with Foreign Property—Independent English and Foreign Wills—Incorporation of Foreign with English Will.*

A testator made two wills with codicils, the earlier relating to property in the United States, the later to property in England, and appointed executors in the two countries, his intention being that the American executors, after realizing so much of his property in America as they required for the purpose of paying his debts there

PROBATE—*continued.*
and the legacies given by his American will and codicils, should realise the residue under the direction of his English representatives and hand the proceeds over to them, to be dealt with as directed by the English will and codicils:—

Held, that the American and English wills were independent documents, and the English will did not incorporate the American will, and that, therefore, the American will and codicils ought not to be included in the probate to be granted of the English will and codicils. In the Goods of Murray - - - - - 65

13. —— *Presumption of Death—Affidavit—Practice—Evidence—Probate Division.*

On an application for leave to depose as to the death of a person who had disappeared, the affidavit of the applicant referred to letters from that person which were not produced or accounted for, and did not explain the delay which had occurred in making the application, and there was no corroborative statement of belief of the death:—

Held, that the hearing must be adjourned for a further and better statement. In the Goods of Clarke - - - - - - 287

14. —— *Presumption of Death—Affidavit as to Date of Death—Filing Letter from Life Insurance Company.*

On a motion for a grant of probate and for leave to depose as to the death of the testator, although the only proof of his death was by presumption from his disappearance, it appeared that notice of the motion had been given to a company with whom the testator had insured his life, and that a letter had been written in reply stating that the company did not intend to interfere in the proceedings.

The Court granted the application subject to the letter being filed. In the Goods of Saul 151

15. —— *Presumption of Death—Practice—Necessity for Advertisements.*

On an application for leave to swear an affidavit of the death of a person who had disappeared, the Court, though the estate was small, and the person had not been heard of for twenty-five years, ordered that advertisements requesting information concerning him should be published in newspapers. In the Goods of Robertson 8

RECEIVER — Before probate — Jurisdiction — Caveat - - - - 291
See Probate. 11.

RESTITUTION OF CONJUGAL RIGHTS—"Desertion without reasonable cause" 175
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RESTRAINT ON ANTICIPATION—Costs—Married woman - - - - - 214
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RULES OF SUPREME COURT:—
—— **Order I., r. 1** (Form and Commencement of Action) - - - - - 214
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—— **Order II., r. 1** (Writ of Summons and Procedure, &c.) - - - - - 214
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—— **Order XVIII., r. 1** (Joinder of causes of action) - - - - - 233
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—— **Order LIX., rr. 4a, 7, 8, 10, 11, 12, 16** (Divisional Courts) - - - 131
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—— **Order LXIV., r. 7** (Time) - - 108
See Divorce. 12.

SALVAGE—Gas Float—Jurisdiction—Admiralty—County court - - - 42
See Ship. 11.
—— Life—Contract with passengers - 273
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—— Maritime lien - - - - 120
See Ship. 10.
—— Parties — Separate causes of action — Practice - - - - 233
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SEPARATION DEED—Costs - - 118
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SEQUESTRATION — Benefice — Jurisdiction of ordinary - - - - - 244
See Ecclesiastical Law. 4.
—— Money held by third person, not party to the action - - - - 171
See Divorce. 14.

SERVICE—Substituted — Necessity of affidavit by petitioner - - - 153
See Divorce. 5.

SETTLEMENT—Variation—Death of petitioner
See Divorce. 15. 263

SHIP—*Collisions at Sea*—Regulations for preventing—In force on and after July 1, 1897. Order in Council dated November 27, 1896 - - - 307

1. — *Bills of Lading—Charterparty—Inherent Vice—"Damaged" Cargo.*

The master of the plaintiffs' vessel signed bills of lading for cargo as "in good order and well conditioned . . . . to be delivered in the like good order and condition" subject to the usual exception as to perils of the seas, and (by incorporation of the charterparty) with the further condition that the balance of freight was payable "on right delivery of cargo less value of cargo . . . . damaged . . . . not covered" by the exception.

The cargo consisted of fresh cut deals, shipped, as usual at the port of loading, without regard to the weather, which at the time was wet. During the voyage part of the cargo became tainted, discoloured, and out of condition. In an action for balance of freight:—

Held, by Gorell Barnes J., that the defendants, the holders of the bills of lading, were not entitled to deduct the amount of the deterioration of the cargo from the balance of freight, as the word "damaged" referred to damage due to breach of contract by the shipowner, and did not include damage arising from want of power in the cargo to bear the ordinary transit in a ship. The Barcore - - - - - - P. 294

2. —— *Collision—Compulsory pilotage—"Ships*

SHIP—*continued.*
trading from any port in Great Britain" to port north and east of Brest—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 625, *sub-s.* 3.

By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 625, sub-s. 3, "Ships trading" from any port in Great Britain within the London district to any port in Europe north and east of Brest are, when not carrying passengers, exempted from compulsory pilotage in the London district.

A British ship laden with a general cargo from Rosario and La Plata for Rotterdam, with leave to carry cattle to London, discharged the cattle in London and proceeded with the cargo to Rotterdam:—

Held, by the Court of Appeal (Lord Esher M.R., Lopes and A. L. Smith L.JJ.), affirming the decision of Sir F. H. Jeune, President, that, whilst the vessel was proceeding from London to Rotterdam, she was a ship "trading" from a port in Great Britain to a port north and east of Brest, within the meaning of the statute, and was, therefore, exempt from compulsory pilotage in the London district.

Courtney v. *Cole* (19 Q. B. D. 447) approved and followed. The Rutland **C. A. 281**

3. —— *Collision—Newport Harbour By-Laws, art.* 13.

By art. 13 of the Newport Harbour By-Laws, 1894: Every vessel shall, unless prevented by stress of weather, be brought into and be taken out of the harbour to the right of mid-channel:—

Held, by the Court of Appeal (Lord Esher M.R., A. L. Smith and Rigby L.JJ.), that, in order to comply with this by-law, every vessel proceeding inward from sea must keep outside the southernmost of the buoys, marking the channel at the entrance to the River Usk, until she can round in on to her proper side between the buoys. The Winstanley - - - - **C. A. 297**

4. —— *Collision — Tug and Tow — Fog — Stopping—Regulations for Preventing Collisions at Sea,* 1884, *art.* 18.

By art. 18 of the Regulations for Preventing Collisions at Sea, "Every steamship when approaching another ship, so as to involve risk of collision, shall slacken her speed, or stop and reverse, if necessary."

A four-masted barque, in tow of a tug, in a dense fog at night in the St. George's Channel, was going at the rate of 1½ knots an hour, and did not stop, though she heard the whistle of a steamer on her port side gradually nearing and indicating danger. The steamer was proceeding at about 2½ knots an hour, and heard the whistle of the tug crossing her bows from starboard to port. She ported and reversed her engines on seeing the barque, but struck her at right angles on her port quarter, and was held to blame under art. 18 for not stopping sooner:—

Held, by Sir F. H. Jeune, President, that the barque was not also to blame for not stopping, as a tug encumbered with a tow is not to be deemed a steamship for all purposes under the rules, and the speed was as slow as was possible consistently with keeping the tow-rope sufficiently taut to prevent the risk of the two vessels being drawn together, and the propeller of the tug being fouled. The Lord Bangor - - - - **P. 28**

SHIP—*continued.*

5. —— *Damage by Collision—Wreck—Expenses of Raising—Basis of Calculation—Remoteness of Damage—The Mersey Docks Act,* 1874 (37 & 38 *Vict. c. xxx.*), *s.* 11.

The Mersey Docks and Harbour Board are by statute (37 & 38 Vict. c. xxx.), the conservancy authority of the port of Liverpool, and may (by s. 11) raise any wreck, sell it, and out of the proceeds retain the expenses.

A lightship and a dredger, the property of the Board, were sunk by the negligence of those in charge of the defendants' vessels, and the Board, having raised the wrecks, sued the defendants for the damages sustained:—

Held, by the Court of Appeal (Lord Esher M.R., A. L. Smith and Rigby L.JJ.), that in respect of raising the wrecks, the Board were entitled to recover from the defendants such an amount as represented the cost of the apparatus necessarily used on the particular occasion and provided by the Board for such purposes; such costs comprising interest upon the capital invested in the apparatus, repairs, a depreciation fund, and the insurance of the apparatus against risk.

The Harrington (13 P. D. 48) approved.

The Board claimed 1500*l.* damages for the loss of the use of the dredger during the fifteen weeks she was under repair, alleging that she might have been let at the rate of 100*l.* a week after completing the work upon which she was engaged at the time of the collision.

Held, that the damages were too remote to be recovered. The Emerald—The Greta Holme **C. A. 192**

6. —— *Damage to Cargo — Bill of Lading incorporating the Harter Act (Act of Congress, Feb.* 13, 1893)—*Negligence in "Management" of the Vessel in Port of Discharge.*] Goods were shipped under a bill of lading incorporating the Act of Congress known as "the Harter Act," by which the owner of the vessel is not to be "held responsible for damage or loss resulting from faults or errors in navigation or in the management of" the vessel.

After the arrival of the vessel at her port of destination, and during the discharge of the cargo, it became necessary to stiffen the ship. For this purpose the engineer ran water into a ballast tank, but negligently omitted first to ascertain the condition of the sounding-pipe and casing, which had, owing to heavy weather during the voyage, become broken. The owner of the goods damaged by the water getting to the cargo, sought to render the shipowner liable:—

Held, by the Divisional Court (Sir F. H. Jeune, President, and Gorell Barnes J.), affirming the decision of a county court judge, that the shipowner was exempt from liability, as the damage resulted from a fault in the "management" of the vessel, and the operation of the exception as to "management" was not limited to the period during which the vessel was at sea, but extended to the period during which the cargo was being discharged. The Glenochil **10**

7. — *Practice—Parties—Joinder of Plaintiffs —Separate Causes of Action—Salvage Actions—*

SHIP—*continued.*

Rules of Supreme Court, 1883, *Order* XVI., *r.* 1; *Order* XVIII., *r.* 1.

The plaintiffs, the owners, masters, and crews of four steam-tugs, issued a writ of summons in rem in the Admiralty Division claiming reward for alleged salvage services rendered to a ship, her cargo and freight.

The owners of the ship, and of her cargo, appeared as defendants, under protest, and moved to set aside the writ, or in the alternative, to strike out all the plaintiffs, except one, on the ground that their causes of action were separate and distinct:—

Held, by Gorell Barnes J., that the motion must be dismissed, the practice in Admiralty as to parties to the suit, and joinder of causes of action, not being affected by the provisions of Order XVI., r. 1, and Order XVIII., r. 1, of the Rules of the Supreme Court, 1883, as interpreted by *Smurthwaite* v. *Hannay* ([1894] A. C. 494). THE MARÉCHAL SUCHET - - - 233

8. —— *Practice—Parties—Joinder of Pilot as Defendant—Action in rem.*

The plaintiffs, the owners of a steamship, issued a writ in rem against the owners and parties interested in another steamship for damage by collision. The owners of the other steamship appeared, and statements of claim, defence and counter-claim were respectively delivered, the defence including an allegation of compulsory pilotage. The plaintiffs then applied to the district registrar for liberty to add, as a defendant, the pilot who was compulsorily in charge of the other steamship at the time of the collision. The registrar refused the application; but on appeal to the President of the Probate, Divorce, and Admiralty Division the plaintiffs obtained the order on the ground that no difficulty would result from engrafting a claim in personam on an action in rem:—

Held, by the Court of Appeal (Lord Esher M.R., Lopes and Rigby L.JJ.), reversing the decision of the President, that, assuming there was jurisdiction, the order ought not, as a matter of discretion, to be made, as the trial of the action might thereby be embarrassed. THE GERMANIC **C. A. 84**

9. —— *Practice—Solicitor's Lien—Charging Order—Assignment of Sum Recovered—Notice—Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28.

An action of damage by collision was compromised on the terms that the defendants, the owners of the steamship *Paris*, should pay to the plaintiff 50 per cent. of the damages sustained by the plaintiff's vessel, each party to bear their own costs of the action, and the amount of the damages to be ascertained by an arbitrator. Prior to the commencement of the action the defendants' solicitors had been pressing the plaintiff for a settlement of claims of clients of theirs against him, and for their own costs when acting for him; and the plaintiff, after the compromise of the action but before the arbitrator made his award, wrote to the defendants' solicitors that he agreed to their settling the amount due to themselves and to certain named clients of theirs "out of the money coming in from *Paris* s.s."

By his award the arbitrator fixed the sum due from the defendants to the plaintiff, which, with the agreed costs of the reference, made a total of 405*l.* 11*s.* 8*d.*, and the defendants' solicitors forwarded to the plaintiff's solicitors a cheque for a small amount as being the balance out of the above total sum after paying the named clients and themselves. The plaintiff's solicitors took out a summons under s. 28 of the Solicitors Act, 1860, for a charging order. It was admitted that there was no collusion, and it was agreed that the award should be treated as a decree:—

Held, by Sir F. H. Jeune, President, that the plaintiff's solicitors in the action were entitled to an order charging the sum recovered with the plaintiff's costs to be taxed as between solicitor and client, on the ground that the fund recovered by the exertions of the plaintiff's solicitors was fixed, though not worked out, at the date of the compromise, and that the subsequent assignment of the fund was void under the statute as being an act done operating to defeat the right of the solicitors to a lien for costs—of which right, by reason of the fund being a sum recovered in the action, the defendants' solicitors, and their clients through them, were effected with notice. THE PARIS - - - - - - - 77

10. —— *Salvage — Service rendered under a Contract for work and labour with third Parties.*

The plaintiffs, with the knowledge and assent of her owners, undertook to lift a sunken vessel, under a contract with the insurers, who advanced to the plaintiffs before the work commenced 40 per cent. of the amount for which the vessel was insured. The vessel was successfully raised, but the operation of lifting proved more costly than was anticipated, and some of the underwriters in the meantime became insolvent. In an action of salvage brought by the plaintiffs against the defendants as owners of the vessel:—

Held, by Sir F. H. Jeune, President, that the contract with the underwriters, which was not dependent on success, precluded the plaintiffs from asserting a maritime lien on the vessel, and claiming salvage remuneration from her owners. THE SOLWAY PRINCE - - - - 120

11. —— *Salvage—Jurisdiction—County Court — Gas Float — Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *ss.* 2, 458, 476—*County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *s.* 3.

The plaintiffs obtained a salvage award in a county court having Admiralty jurisdiction for services rendered to a gas float adrift in the tidal waters of the Upper Humber. The structure was of iron, boat-shaped, and contained gas, which by its own elasticity supplied day and night for about six weeks the light raised above it. A Divisional Court sitting in Admiralty affirmed the award on the ground that though the gas float was not (as found by the county court judge) a "ship" or "wreck" within the meaning of ss. 2 and 458 of the Merchant Shipping Act, 1854, so as to be a subject of salvage under the latter section, there was Admiralty jurisdiction under s. 476 of that Act as such a structure, used in connection with navigation, and exposed in the ordinary course of its use to the perils of the sea would have been within the jurisdiction

SHIP—*continued.*

of the Admiralty if adrift upon the high seas, and was, therefore, by virtue of that section, also within the jurisdiction of the Admiralty when within the body of a county ([1895] P. 301). On appeal:—

Held, by the Court of Appeal (Lord Esher M.R., Lopes and Kay L.JJ.), reversing the decision of the Divisional Court, that the structure in question, not being a ship or part of a ship or of her apparel or cargo, or the wreck of them, was not a subject-matter in respect of which a salvage claim could be maintained in the High Court of Admiralty, and was therefore not within the jurisdiction of a county court under s. 3 of the County Courts Admiralty Jurisdiction Act, 1868. The Gas Float Whitton No. 2. - C. A. 42

12. —— *Salvage (Life)—Authority of Master—Contract with Passengers.*

The defendants' steamship, three days out from Montreal for Liverpool, stranded on the coast of Labrador. The master landed his passengers and crew, provided them with food and accommodation, and the same day intercepted a passing steamer, which, at the request of the master, conveyed the passengers to their destination.

The following day a steamer passing in the opposite direction, at the like request, took off the greater part of the crew, conveyed them to Quebec, and, on the way, telegraphed for assistance to be sent.

By the contract with the passengers the defendants were "not liable for loss or delay from the act of God . . . . perils of the seas, rivers, or navigation . . . . or the wrongful act or default" of their servants. The defendants' vessel became a total loss, materials to the value of 335*l.* only being saved.

In an action in personam by the owners of the passing steamers for salvage, or, in the alternative, for remuneration for services rendered at request, the defendants tendered 200*l.*:—

Held, by Gorell Barnes J., that the tender must be upheld, as the passengers and crew were not in any danger, so that no life salvage was claimable; and, as the defendants were under no obligation to forward the passengers to their destination, the master, in transshipping them, acted as the agent of the passengers, and not of the defendants.

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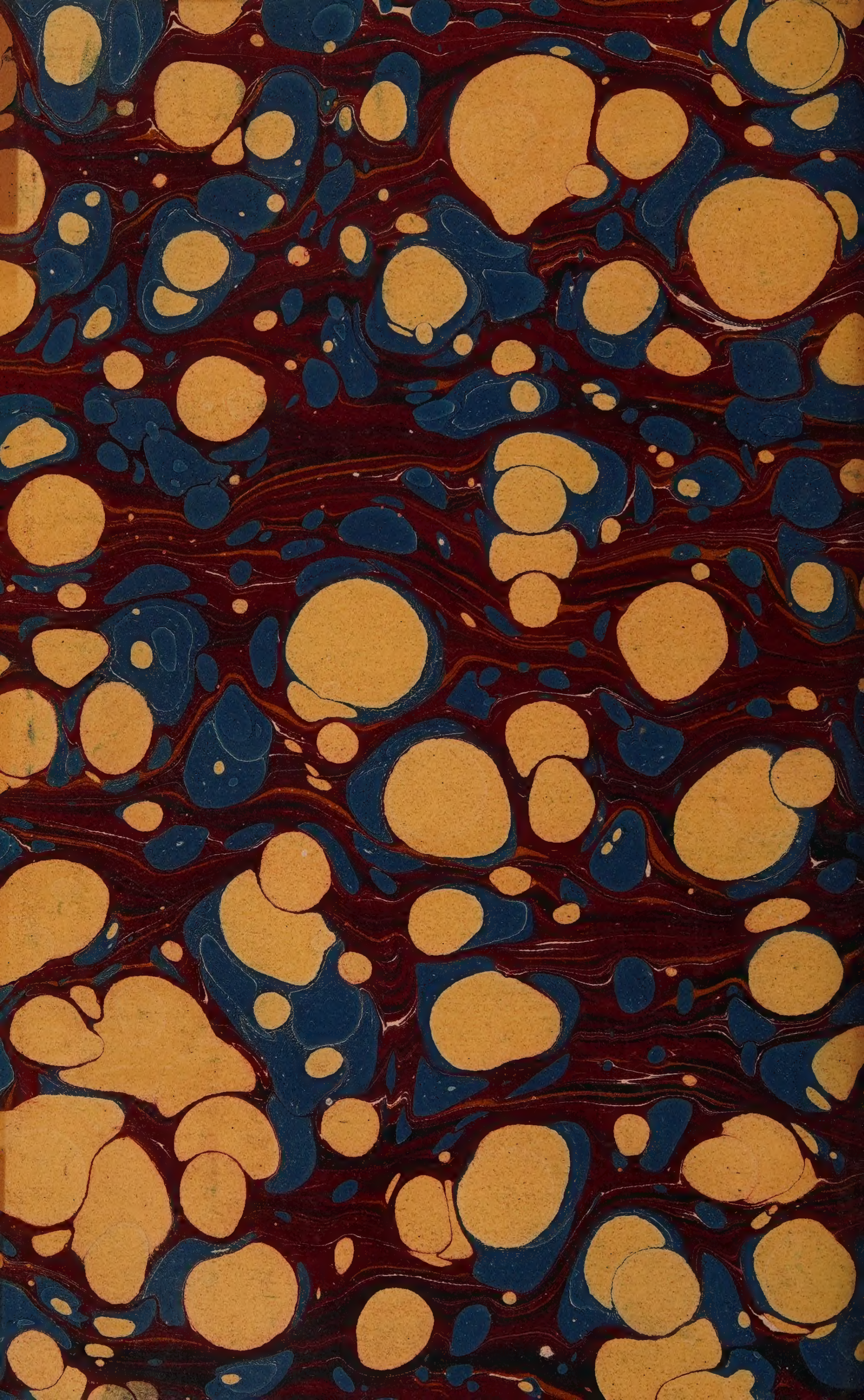

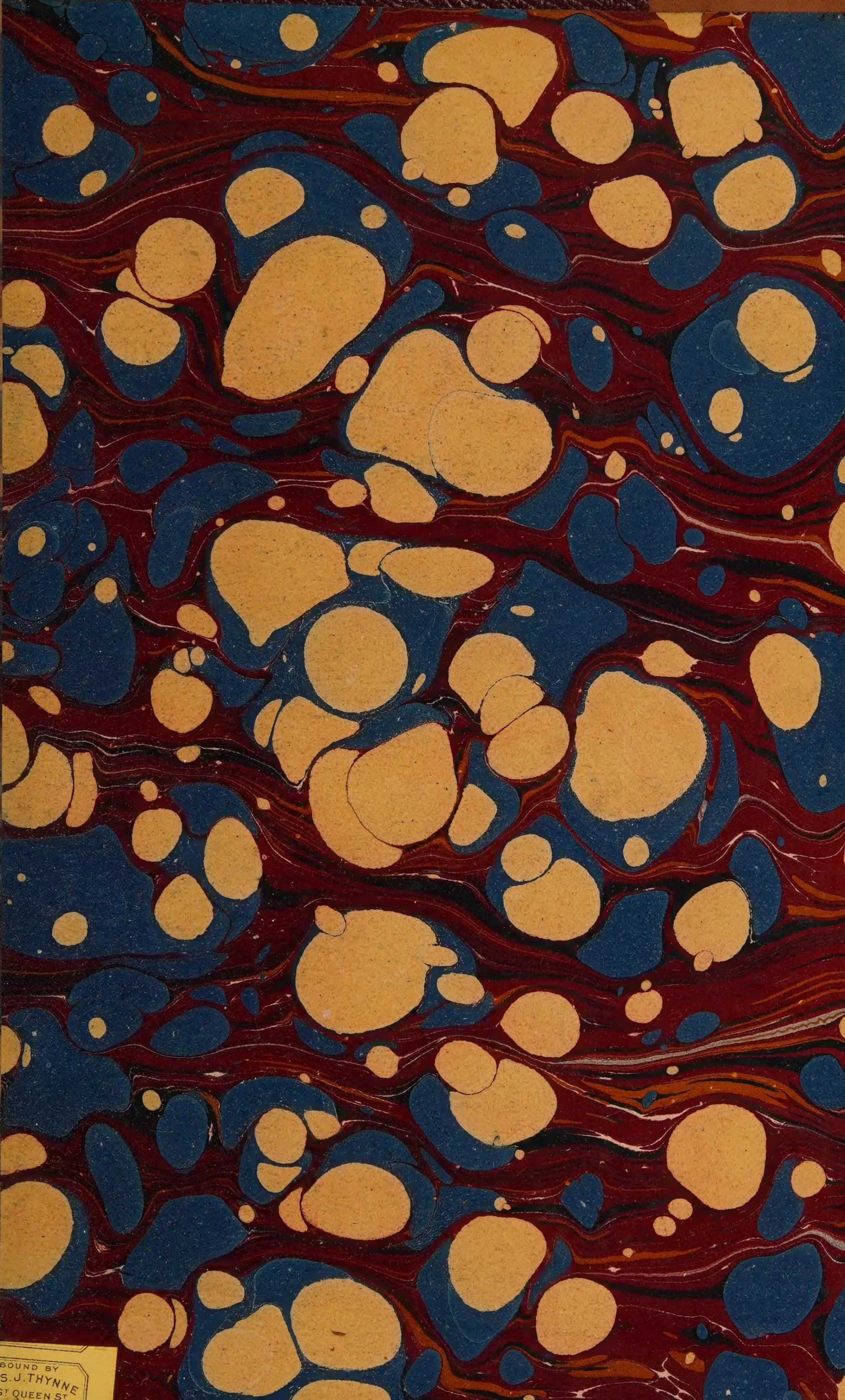

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